

in the

United States Court of Appeals

For the Seventh Circuit

No. 11573

HARRY TAYLOR, PETER A. CALUS, JAMES W.
BREWSTER, WILLIAM J. LANGSTON AND H. C.
GREER,

Plaintiffs-Appellants,

vs.

L. B. FEE; ET AL., ETC., ET AL.,

Defendants-Appellees,

AND

STATE OF CALIFORNIA,

Intervening-Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of July (it being the 4th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Five and of the Independence of the United States of America, the 180th Year.

Present:

Honorable John P. Barnes, Chief Judge.
Honorable William H. Holly, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable J. Sam Perry, District Judge.
Honorable Win G. Knoch, District Judge.
Honorable Julius J. Hoffman, District Judge.
Roy H. Johnson, Clerk.
William W. Kipp, Sr., Marshal.

Tuesday, July 12, 1955.

Court met pursuant to adjournment.

Present: Honorable Julius J. Hoffman, Trial Judge.

2

Statement Pursuant to Rule 10(b).

2

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

Harry Taylor, *et al.*,

Plaintiffs,

vs.

O. E. Swan, *et al.*,

Defendants.

Civil Action
No. 53 C 56

State of California,

Intervening Defendant.

Caption and statement required by Rule 10(b) of the Rules of the United States Court of Appeals for the Seventh Circuit.

Caption and Title.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

Harry Taylor, Peter A. Calus, James W. Brewster, William J. Langston, and H. C. Greer,

Plaintiffs-Appellants,

vs.

L. B. Fee, H. W. Burtness, George H. Dugan, H. V. Bordwell, H. J. Reeser, C. E. McDaniels, J. K. Hinks, C. W. Kealey, B. W. Fern, and Don A. Miller, individually and as members of the First Division of the National Railroad Adjustment Board, and John M. MacLeod, as Executive Secretary of the First Division of the National Railroad Adjustment Board,

Defendants-Appellees,

State of California,

Intervening Defendant-Appellee.

Civil Action
No. 53 C 56.

3

Time of the Commencement of the Suit.

The suit was started January 14, 1953.

**Original Parties and Those Who Have Become Parties
Before the Appeal.**

(a) Original Parties:

Harry Taylor, Peter A. Calus, James W. Brewster, William J. Langston, and H. C. Greer, plaintiffs.

O. E. Swan, H. W. Burtness, George H. Dugan, T. L. Green, H. J. Reeser, John P. Brindley, B. C. Johnson, C. W. Kealey, B. W. Bern, and Don A. Miller, individually and as members of the First Division of the National Railroad Adjustment Board, and John M. MacLeod, as Executive Secretary of the First Division of the National Railroad Adjustment Board, defendants.

(b) Changes in Parties:

The following substitution of defendants has taken place:

J. K. Hinks in lieu of B. C. Johnson;

C. E. McDaniels in lieu of John P. Brindley;

H. V. Bordwell in lieu of T. L. Green; and

L. B. Fee in lieu of O. E. Swan.

4 (c) Intervening Defendant:

The State of California has intervened as a defendant.

**The Several Dates When the Respective Pleadings Were
Filed.**

Complaint, filed January 14, 1953.

Answer of the United States of America, filed March 14, 1953.

Answer of O. E. Swan, H. W. Burtness, George H. Dugan, T. L. Green, and H. J. Reeser, the carrier members of the First Division of the National Railroad Adjustment Board, filed March 17, 1953.

Complaint in intervention of the State of California, filed December 3, 1953, which constitutes an answer by the State of California.

Motion for summary judgment of the First Division of the National Railroad Adjustment Board, John M. MacLeod as Executive Secretary of the Division, and the United States of America, filed February 5, 1954.

Motion for summary judgment of the State of California, filed February 5, 1954.

Statement Pursuant to Rule 10(b).

Motion for preliminary hearing, of the defendants O. E. Swan, H. W. Burtness, George H. Dugan, T. L. Green, and H. J. Reeser, filed February 5, 1954.

Plaintiffs' motion for summary judgment, filed July 21, 1954.

5 Motion for judgment on the pleadings for failure to join indispensable parties, of the State of California, filed December 16, 1954.

Plaintiffs' motion to modify court's memorandum of decision, dated June 29, 1955, filed July 8, 1955.

Statement Concerning Attachment of Property, etc.

No defendants were arrested, no bail was taken, and no property was attached or arrested.

Time When Trial Was Had and Name of Judge.

No trial was had. The motion of the State of California for judgment on the pleadings for failure to join indispensable parties, and the motions of the plaintiffs, of the United States of America, and of the State of California for summary judgment were considered on briefs and, after oral argument on December 20, 1954, were taken under advisement.

The Honorable Julius J. Hoffman was the Judge.

Questions Referred to Commissioner, etc.

No question was referred to a commissioner, master, or referee.

6

Trial by Jury, etc.

The case was heard by the Judge without a jury, as above set forth, on motions filed by the parties.

Date of Entry of Interlocutory and Final Decree.

No interlocutory decree was entered.

The final decree was entered on July 12, 1955.

Complaint.

Date Appeal Was Taken.

The appeal was taken August 11, 1957

Dated: September 9, 1955.

Burke Williamson,
Adams Williamson & Turney,
39 South La Salle Street,
Chicago 3, Illinois,
*Attorneys for Plaintiffs-
Appellants.*

7 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-56) * *

Be It Remembered, that on to wit, the 14th day of January, 1953, the above entitled action was commenced by the filing of the Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to wit:

8 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53-C-56) * *

COMPLAINT.

Harry Taylor, Peter A. Calus, James W. Brewster, William J. Langston, and H. C. Greer, plaintiffs by Burke Williamson and Adams Williamson & Turney, their attorneys, complaining of the above-named defendants, allege:

1. Plaintiffs are citizens of the State of California, and at all times material hereto have been employed as locomotive engineers, as locomotive firemen, or as trainmen by the State Belt Railroad of California, hereinafter sometimes referred to as the Railroad.

2. The defendants include O. E. Swan, H. W. Burtness, George H. Dugan, T. L. Green, H. J. Reeser, John P. Brindley, B. C. Johnson, C. W. Kealey, B. W. Fern, and Don A. Miller. These defendants are all of the members of the First Division of the National Railroad Adjustment

Board which acts pursuant to paragraph (h) of Section 3 First of the Railway Labor Act (45 U. S. C. Sec. 153 First (h)). Each of these defendants is sued both in his individual capacity and as a member of the First Division of the Adjustment Board. The National Railroad Adjustment Board maintains its headquarters in Chicago, Illinois, and the members thereof meet there regularly pursuant to paragraph (r) of Section 3 First of the Railway Labor Act (45 U. S. C. Sec. 153 First (r)). The defendant John M. MacLeod is sued in his capacity as Executive Secretary of the First Division of the National Railroad Adjustment Board.

3. The plaintiffs' right to relief arises out of the same occurrences or transactions, and questions of law and fact common to the rights of each of the plaintiffs are involved in this action.

4. This action arises under Section 3 of the Railway Labor Act (45 U. S. C. Sec. 153) and this Court therefore has jurisdiction of this action as one arising under an Act of Congress regulating commerce (28 U. S. C. Sec. 1337).

5. The State Belt Railroad of California is a common carrier by railroad, owned and operated by the State of California, and its management and control are vested in the Board of State Harbor Commissioners. It employs from 125 to 150 employees, and its lines extend along the water front of San Francisco harbor. It receives and transports freight to and from a large number of industrial plants, the state-owned wharves in San Francisco harbor, and at least three interstate railroads. The larger part of the freight thus transported has its origin or destination in states other than California, and in transporting this freight the State Belt Railroad of California is engaged in interstate commerce and is subject to the Federal Safety Appliance Act (45 U. S. C. Chap. 1)

10 (*United States v. State of California*, 297 U. S. 175) and the Federal Carriers' Taxing Act (45 U. S. C. Sec. 261, et seq.) (*State of California v. Anglim*, 129 F. 2d 455).

6. The plaintiffs allege that a collective bargaining agreement was entered into effective September 1, 1942, by and between the said Board and a labor union commonly known as the Brotherhood of Locomotive Firemen and Enginemen, and a labor union known as the Brotherhood of Railroad Trainmen for the purpose of establishing rates of pay, rules and working conditions of the crafts of loco-

Complain?

motive firemen, of locomotive engineers, and of trainmen employed by the Railroad.

7. The plaintiffs Taylor and Calus allege that they rendered services as locomotive firemen and engineers to the Railroad and the State of California for many years subsequent to September 1, 1942, and that said services were rendered pursuant to the terms and conditions of said collective agreement which became effective September 1, 1942, and that the plaintiffs Taylor and Calus were paid for their services, except as herein indicated, in accordance with the rates of pay contained in said agreement.

8. The plaintiff Taylor alleges that a dispute developed with the management of the Railroad regarding his true seniority date as an engineer; that he took promotion examinations and successfully passed the same and received an engineer's seniority date of April 27, 1945, all in accordance with the terms of the collective agreement which became effective September 1, 1942, but the management insists that he must take and successfully pass a second promotion examination under the terms of said agreement, and declines to recognize his engineer's seniority date of April 27, 1945.

11 9. The plaintiff Taylor alleges that the said dispute regarding his engineer's seniority date was referred by petition to the National Railroad Adjustment Board, First Division, pursuant to paragraph (i) of Section 3 First of the Railway Labor Act (45 U. S. C. Sec. 153 First (i)) on or about April 6, 1949, and was docketed by the Executive Secretary of the First Division as Docket No. 24,211.

10. The plaintiff Calus alleges that a dispute developed with the management of the Railroad regarding his right to receive pay for one day, or eight hours, for pilot service rendered by the plaintiff Calus to the Railroad and the State of California on March 19, 1949, pursuant to the terms of the collective agreement which became effective September 1, 1942.

11. Plaintiff Calus alleges that the said dispute regarding his right to be compensated for pilot services rendered on March 19, 1949, was referred by petition to the National Railroad Adjustment Board, First Division, pursuant to paragraph (i) of Section 3 First of the Rail-

Complaint.

way Labor Act (45 U. S. C. Sec. 153 First (i)) on or about February 1, 1950, and was docketed by the Executive Secretary of the First Division as Docket No. 25,597.

12. The plaintiffs Brewster, Langston, and Greer allege that they rendered services as trainmen to the Railroad and the State of California for many years subsequent to September 1, 1942, and that said services were rendered pursuant to the terms and conditions of said collective bargaining agreement which became effective September 1, 1942, and that the plaintiffs Brewster, Langston, and Greer were paid for their services, except as herein indicated, in accordance with the rates of pay contained in said agreement.

13. The plaintiff Brewster alleges that a dispute developed with the management of the Railroad regarding his continued employment; that he was employed as a yardman on the Railroad on April 9, 1943 and on August 10, 1943 took a Civil Service Examination, receiving a grade of 83.25; that he continued to work as a yardman from April 9, 1943 until June 30, 1947, at which time he was removed from service; that in a letter addressed to him by the Superintendent of the Railroad dated July 1, 1947 he was advised that he was a "Duration" switchman and as such might not work beyond June 30, 1947; and that subsequent to such letter of July 1, 1947 he claimed pay for each day he was held from service, the claim being made pursuant to the provisions of the said collective bargaining agreement.

14. The plaintiff Brewster alleges that the said dispute regarding his employment was referred by petition to the National Railroad Adjustment Board, First Division, pursuant to paragraph (i) of Section 3 First of the Railway Labor Act (45 U. S. C. Sec. 153 First (i)) on or about June 14, 1949, and was docketed by the Executive Secretary of the First Division as Docket No. 25,034.

15. The plaintiff Langston alleges that a dispute developed with the management of the Railroad regarding his right to receive time and one-half pay for one day for a work shift started in the preceding twenty-four hour period, on account of services as engine foreman rendered by the plaintiff Langston to the Railroad and the State of California on December 20, 1949, pursuant to the terms of the collective bargaining agreement which became effective September 1, 1942.

16. Plaintiff Langston alleges that the said dispute regarding his right to be compensated for services rendered as engine foreman on December 20, 1949 was referred by petition to the National Railroad Adjustment Board, First Division, pursuant to paragraph (i) of Section 3 First of the Railway Labor Act (45 U. S. C. Sec. 153 First (i)) on or about August 13, 1951, and was docketed by the Executive Secretary of the First Division as Docket No. 28,223.

17. The plaintiff Greer alleges that a dispute developed with the management of the Railroad regarding his right to receive pay for eight hours for services rendered by the plaintiff Greer as an engine crew helper to the Railroad and the State of California on March 20, 1949, in addition to his earnings on his regular assignment March 19, 1949, pursuant to the terms of the collective agreement which became effective September 1, 1942.

18. The plaintiff Greer alleges that the said dispute regarding his right to be compensated for services rendered March 20, 1949 was referred by petition to the National Railroad Adjustment Board, First Division, pursuant to paragraph (i) of Section 3 First of the Railway Labor Act (45 U. S. C. Sec. 153 First (i)) on or about October 5, 1949, and was docketed by the Executive Secretary of the First Division as Docket No. 25,655.

19. Plaintiffs allege that it is their right under Section 3, First, (i) to (o), inclusive, of the Railway Labor Act (45 U. S. C. Sec. 153 First, (i) to (o)) to have their respective petitions considered and decided according to their merits by the defendant members of the First Division sitting in executive session, and to have awards rendered accordingly, but notwithstanding plaintiffs' rights in this respect the defendant members of the First Division,

and particularly the defendants O. E. Swan, H. W.

14 Burtness, George H. Dugan, T. L. Green and H. J.

Reeser, being the carriers' representatives on the

First Division selected according to Section 3 First (b)

of the Railway Labor Act (45 U. S. C. Sec. 153 First (b)),

have refused and now do refuse to consider and decide

the plaintiffs' petitions, and they declare that they will not

participate in the handling of plaintiffs' petitions other

than to dismiss them without considering their merits, as

more particularly set forth in document hereto attached,

marked Exhibit A, and made a part hereof.

20. Plaintiffs allege that unless this Court will com-

mand and enjoin the defendant members of the First Division to consider and decide the aforesaid Dockets Nos. 24,211, 25,597, 25,034, 28,223, and 25,655 and to perform the duties imposed upon the First Division by the Railway Labor Act these plaintiffs are without any form of judicial or administrative remedy.

Wherefore the plaintiffs pray that an injunction be issued herein directed to O. E. Swan, H. W. Burtness, George H. Dugan, T. L. Green, H. J. Reeser, John P. Brindley, B. C. Johnson, C. W. Kealey, B. W. Fern, and Don A. Miller, individually and as members of the First Division of the National Railroad Adjustment Board, and to John M. MacLeod as Executive Secretary of the First Division of the National Railroad Adjustment Board, commanding them to take jurisdiction of Dockets Nos. 24,211, 25,597, 25,034, 28,223, and 25,655, to consider and decide said Dockets, and to issue awards and orders in said Dockets in a manner consistent with the provisions of Section 3, First of the Railway Labor Act (45 U. S. C. Sec. 153 First). Plaintiffs pray for such other and further relief as may be proper in the premises.

Burke Williamson;

Adams Williamson & Turney,
39 South La Salle Street,
Chicago 3, Illinois,

*Attorneys for Plaintiffs Harry
Taylor, Peter A. Calus, James
W. Brewster, William J. Lang-
ston, and H. C. Greer.*

January 14, 1953.

16

Exhibit A.

National Railroad Adjustment Board

First Division

39 S. La Salle St., Chicago, Ill.

February 25, 1952

Messrs. Lash, Chairman,
Johnson,
Kealey,
Coyle,
Brindley, Labor Members.

On June 20th, 1951, the Supreme Court of the State of California—

State of California,

Plaintiff and Appellant,

vs.

Brotherhood of Railroad Trainmen, an unincorporated association, and the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association,

Defendants and Respondents.

David T. Lock,

Intervenor and Appellant.

S. F. 18003

held that the employees of a state-owned railroad, engaged in interstate commerce, do not come within the coverage of the Railway Labor Act and that a collective bargaining contract between the Brotherhood of Railroad Trainmen and the administrative agency operating the State Belt Railroad cannot supersede state laws governing the employees' rates of pay and conditions of employment.

In No. 320—Brotherhood of Railroad Trainmen *vs.* State of California, petition for writ of certiorari was denied, leaving in effect a decision of the Supreme Court of California holding that the Federal Railway Labor Act does not apply to a State-owned and operated railroad engaged in interstate commerce, even though the operation of the railroad is a proprietary activity of the State.

Therefore this Division has no jurisdiction and this is to advise you that the Carrier Member will not participate in the handling of the following State Belt Railroad of California dockets other than to dismiss them:

| | |
|--------------|---------------------|
| Docket 24109 | B L F & E |
| 24211 | B L F & E |
| 25034 | B R T |
| 25597 | B L F & E |
| 25655 | B L F & R and B R T |
| 28223 | B R T |

T. L. Green,

For the Carrier Members.

CC—Messrs. Robert F. Wylie,

Port Manager,

Board of State Harbor Commissioners,
Ferry Building, San Francisco, Cal.

J. M. MacLeod, Executive Secretary,
Carrier Members.

17 And afterwards on, to wit, the 16th day of March, 1953, came the First Division of the National Railroad Adjustment Board, John M. MacLeod, as Executive Secretary of the Division and the United States of America, by their attorneys, and filed in the Clerk's office of said Court their certain Answer Of The United States Of America in words and figures following, to wit:

18 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-56) * *

ANSWER OF THE UNITED STATES OF AMERICA.

Now come the First Division of the National Railroad Adjustment Board, John M. MacLeod, as Executive Secretary of the Division and the United States of America, the latter being the real party in interest under the Railway Labor Act, and on which service was made in accordance with Rule 4(d)(4) and (5) of the Federal Rules of Civil Procedure, and through their undersigned attorneys acting under the direction of the Attorney General of the United States of America, and in answer to the

complaint herein, admit each and all of the allegations contained in the said complaint, notwithstanding the position taken by the Carrier Members of the said First Division as evidenced by the attached Exhibit A, and say that the relief prayed for should be granted by this Court, and that the denial of jurisdiction and refusal to participate in the handling of certain named dockets, other than to dismiss, contained in Exhibit A to the said complaint, be found in error and set aside.

Wherefore, the defendants' attorneys pray that the relief prayed for by plaintiffs be granted by this Court, and that the aforesaid denial of jurisdiction and refusal to participate, on the part of the Carrier Members of the said Division, be set aside as erroneous, arbitrary, unsupported by substantial evidence and contrary to law.

James E. Kilday,

Frank J. Oberg,

*Special Assistants to the
Attorney General.*

Edward P. Hodges,

Acting Assistant Attorney General.

Otto Kerner, Jr.,

United States Attorney.

Certificate of Service.

I certify that a true copy of the foregoing answer was served by mailing this 12th day of March, 1953, to counsel for all parties of record in this action.

Frank J. Oberg.

Dated this 12th day of March, 1953.

Exhibit A.

National Railroad Adjustment Board

First Division

39 S. La Salle Street, Chicago, Ill.

Phone—ANDover 3-1059

February 26, 1953

Edward P. Hodges

Acting Assistant Attorney General
United States Department of Justice
Washington 25, D. C.Re: Harry Taylor, *et al.* v. O. E. Swan, *et al.* (National Railroad Adjustment Board) — Civil
53 C 56.

Dear Sir:

In your letter of February 20, 1953, you request advice as to the action in the above matter contemplated by the Board. I am authorized to inform you that the carrier representatives on the First Division will continue, in accordance with their letter which is attached to the complaint as Exhibit A, to decline to participate in the handling of the dockets referred to therein, other than to dismiss them, until there has been an authoritative determination that the Board has jurisdiction to determine the disputes which are the subject of those dockets. The carrier members have engaged counsel to represent them in the above matter to the end that, if the present action is a proper one for the purpose, a determination as to the Board's jurisdiction may be obtained therein.

With reference to your intention to answer in the above matter with a confession of error on the basis of the authorities referred to in your letter, we respectfully direct your attention to the fact that the holding of the Supreme Court of California in *State v. Brotherhood of Railroad Trainmen*, 232 P. 2d 857, was, as the Fifth Circuit Court of Appeals recognized, in part rested on a determination that under state law "the Harbor Board could not properly enter into the contract with the brotherhoods and bind the state without the approval of the

Department of Finance * * * 232 P. 2d at 863. We do not believe that the Board has jurisdiction to interpret or apply an agreement which has thus been held invalid under the local law by the state court of final jurisdiction. Nor do we believe that the authorities referred to in your letter have any bearing on this point. Will you not kindly give consideration to this factor.

/s/ T. L. Green,

*For the Carrier Members of the First
Division of the National Railroad
Adjustment Board.*

22 And afterwards on, to wit, the 17th day of March, 1953 came the Defendants, O. E. Swan, et al., by their attorneys and filed in the Clerk's office of said Court their certain Answer in words and figures following, to wit:

23 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—53-C-56)

ANSWER.

* Come now O. E. Swan, H. W. Burtness, George H. Dugan, T. L. Green and H. J. Reeser, the carrier members of the First Division of the National Railroad Adjustment Board, by their attorneys, and for answer to the complaint herein state as follows:

First Defense.

The complaint fails to state a claim against such defendants upon which relief can be granted.

Second Defense.

The court lacks jurisdiction over the subject matter hereof for the reasons that:

(1) The action is in substance and effect one against the United States to which it has not given its consent.

(2) The action is not authorized under the Railway Labor Act (45 U. S. C. § 151 et seq.) and does not arise under that Act or any other Act of Congress regulat-

24 ing commerce or protecting trade, and commerce against restraints and monopolies.

(3) The action is one for a mandatory injunction in the nature of a writ of mandamus to control the exercise of a discretion committed to the defendants by statute.

Third Defense.

1. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the complaint.

Defendants further allege that their only information concerning the plaintiff Harry Taylor is in the form of allegations contained in a submission filed in his behalf with the Executive Secretary of the First Division of the National Railroad Adjustment Board by the Brotherhood of Locomotive Firemen and Enginemen in a proceeding bearing Docket No. 24211; that their only information concerning plaintiff Peter A. Calus is in the form of allegations contained in submissions filed with the Executive Secretary of the First Division of the National Railroad Adjustment Board in his behalf by the Brotherhood of Locomotive Firemen and Enginemen and in behalf of the State Belt Railroad of California by the Board of State Harbor Commissioners in a proceeding bearing Docket No. 25597; that their only information concerning plaintiff James W. Brewster is in the form of allegations contained in submissions filed with the Executive Secretary of the First Division of the National Railroad Adjustment Board in his behalf by the Brotherhood of Railroad Trainmen and in behalf of the State Belt Railroad of California by the Board of State Harbor Commissioners in a proceeding bearing Docket No. 25034; that their only information concerning plaintiff William J. Langston is in the form of allegations contained in submissions filed with the Executive Secretary of the First Division of the National Railroad Adjustment Board in his behalf by the Brotherhood of Railroad Trainmen and in behalf of the State Belt Railroad of California by the Board of State Harbor Commissioners in a proceeding bearing Docket No. 28223; and that their only information concerning plaintiff H. C. Greer is in the form of allegations contained in submissions filed with the Executive Secretary of the First Division of the National Railroad Adjustment Board in his behalf by the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen

and in behalf of the State Belt Railroad of California by the Board of State Harbor Commissioners in a proceeding bearing Docket No. 25655.

2. Defendants admit the allegations contained in paragraphs 2 and 3 of the complaint except that they deny that any of them has any individual interest in the controversy. Defendants allege that their actions complained of were in the performance of their duties under Section 153 of the Railway Labor Act (45 U. S. C. § 153); that the relief sought against them and each of them is only in their official capacity as members of the First Division of the National Railroad Adjustment Board; and that the relief sought against them and each of them is to control the exercise of a discretion committed to them under the said section of the Railway Labor Act. Defendants further allege that the action is in substance and effect one against the United States to which it has not given its consent.

3. Defendants deny each and every allegation contained in paragraph 4 of the complaint and allege that the question of the validity of the agreement alleged in paragraph 6 of the complaint is determinative hereof and that this question is one arising under the law of the State of California, as will appear hereinafter.

4. Defendants admit the allegations contained in paragraph 5 of the complaint except that they assert that the meaning and effect of the decisions referred to therein is a matter of law and they neither admit nor deny the conclusions of law that the State Belt Railroad of California is engaged in interstate commerce, is subject to the Federal Safety Appliance Act (45 U. S. C. Chap. 1), and is subject to the Federal Carriers' Taxing Act (45 U. S. C. Sec. 261, et seq.).

5. Defendants admit the execution of the agreement alleged in paragraph 6 of the complaint and allege that the said agreement was not entered into in compliance with the law of the State of California. Defendants further allege that in a proceeding in the Supreme Court of the State of California to which the State of California, the Brotherhood of Railroad Trainmen, and the Brotherhood of Locomotive Firemen and Enginemen were parties the agreement alleged in the said paragraph 6 was held to be invalid and of no effect because the action of the State Board of Harbor Commissioners with respect thereto was ineffective under the law of the State of California to make

such agreement binding upon the State of California. *State v. Brotherhood of Railroad Trainmen et al.*, 323 P. 2d 857 (Cal. 1951), cert. denied, 342 U. S. 876.

6. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint.

7. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint.

8. Defendants admit that a dispute involving a claim of plaintiff Harry Taylor was referred to the First Division of the National Railroad Adjustment Board on April 5, 1949, and was docketed by the Executive Secretary of the First Division as Docket No. 24211. Defendants allege that an ex parte submission on behalf of Harry Taylor was filed by A. N. Williams, General Chairman Brotherhood of Locomotive Firemen and Enginemen. Defendants further allege that the parties to the dispute were stated in the said submission to be the Brotherhood of Locomotive Firemen and Enginemen and the California State Belt Railroad and that the dispute stated by the said submission to exist between these parties is one as to whether the State

27 Personnel Board of California erred in refusing to certify Harry Taylor for permanent employment as an engineer by the State Belt Railroad of California and whether the Board of Harbor Commissioners erred in refusing to recognize Harry Taylor to be entitled to employment as an engineer in the absence of such a certification. Defendants further allege that the claim on behalf of Harry Taylor is alleged in the said submission to be based on certain provisions of the agreement alleged in paragraph 6 of the complaint herein, which agreement has been held to be invalid, as alleged in paragraph 5 hereof.

9. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the complaint.

10. Defendants admit that a dispute involving a claim of plaintiff Peter A. Calus was referred to the First Division of the National Railroad Adjustment Board on January 31, 1950, and was docketed by the Executive Secretary of the First Division as Docket No. 25597. Defendants allege that an ex parte submission on behalf of Peter A. Calus was filed by A. N. Williams, General Chairman,

Brotherhood of Locomotive Firemen and Enginemen, State Belt R. R. of California, and that the parties to the dispute were stated therein to be the Brotherhood of Locomotive Firemen and Enginemen and the State Belt Railroad of California. Defendants further allege that a submission with respect to the claim of Peter A. Calus was filed in behalf of the State Belt Railroad of California by the Board of State Harbor Commissioners. The dispute, as stated in the said submissions, is one as to whether under the provisions of the agreement alleged in paragraph 6 of the complaint herein Peter A. Calus is entitled to eight hours pay for "pilot service" in addition to eight hours pay which he received for "switching service" for work performed by him on March 19, 1949, and is one growing out of the interpretation or application of the said invalid agreement.

11. Defendants allege that they are without knowl-
28 edge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the complaint.

12. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

13. Defendants admit that a dispute involving a claim of plaintiff James W. Brewster was referred to the First Division of the National Railroad Adjustment Board on September 8, 1949, and was docketed by the Executive Secretary of the First Division as Docket No. 25034. Defendants allege that an ex parte submission on behalf of James W. Brewster was filed by A. C. McFadden, General Chairman, Brotherhood of Railroad Trainmen, and that the parties to the dispute were stated therein to be the Brotherhood of Railroad Trainmen and the State Belt Railroad of California. Defendants further allege that a submission with respect to the claim of James W. Brewster was filed in behalf of the State Belt Railroad of California by the Board of State Harbor Commissioners. The dispute, as stated in the said submissions, is one as to whether under the provisions of the agreement alleged in paragraph 6 of the complaint herein James W. Brewster acquired a permanent employment status as a yardman, and is one growing out of the interpretation or application of the said invalid agreement.

14. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15.

15. Defendants admit that a dispute involving a claim of plaintiff William J. Langston was referred to the First Division of the National Railroad Adjustment Board on October 23, 1951, and was docketed by the Executive Secretary of the First Division as Docket No. 28223. Defendants allege that an ex parte submission on behalf of William J. Langston was filed by N. L. Langston, General Chairman, Brotherhood of Railroad Trainmen, and
29 that the parties to the dispute were stated therein to be the Brotherhood of Railroad Trainmen and the California State Belt Railroad. Defendants further allege that a submission with respect to the claim of William J. Langston was filed on behalf of the State Belt Railroad of California by the Board of State Harbor Commissioners. The dispute, as stated in the said submissions, is one as to whether under the provisions of the agreement alleged in paragraph 6 of the complaint herein William J. Langston is entitled to eight hours pay at a time and one-half rate for service performed as engine foreman on an extra engine on December 20, 1949, and is one growing out of the interpretation or application of the said invalid agreement.

16. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17.

17. Defendants admit that a dispute involving a claim of plaintiff H. C. Greer was referred to the First Division of the National Railroad Adjustment Board on February 8, 1950, and was docketed by the Executive Secretary of the First Division as Docket No. 25653. Defendants allege that an ex parte submission on behalf of plaintiff H. C. Greer was filed by A. C. McEadden, General Chairman, Brotherhood of Railroad Trainmen, State Belt Railroad of California, and A. N. Williams, General Chairman, Brotherhood of Locomotive Firemen and Enginemen, State Belt Railroad of California, and that the parties to the dispute were stated therein to be the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, and the State Belt Railroad of California. Defendants further allege that a submission with respect to the claim of H. C. Greer was filed in behalf of the State

Belt Railroad of California by the Board of State Harbor Commissioners. The dispute, as stated in the said submissions, is one as to whether under the provisions of the agreement alleged in paragraph 6 of the complaint herein, H. C. Greer is entitled to eight hours pay for services performed on March 20, 1949, in addition to his earnings on his regular assignment; and is one growing out of the interpretation or application of the said invalid agreement.

18. Defendants deny that it is plaintiffs' right or the right of any of them under Section 3, First (i) to (o), inclusive, of the Railway Labor Act (45 U. S. C. § 153 First (i) to (o) or under any other section of the said Act to have the petitions concerning their respective claims considered and decided on their merits by the members of the First Division or any of them, sitting in executive session or otherwise, or to have awards rendered in accordance with such a consideration and decision on the merits. Defendants admit that they have refused and do now refuse to consider and decide such petitions on the merits and that they will not participate in the handling of such petitions except to dismiss them for want of jurisdiction without consideration of their merits. Defendants further admit that the document attached to the complaint as Exhibit A is their letter and allege that it was written to inform the labor members of the First Division of their opinion that the Division lacks jurisdiction to consider and decide the disputes referred to therein. Defendants further allege that in so acting they were acting in their official capacity as members of the First Division of the National Railroad Adjustment Board and that they were acting in the performance of a duty and in the exercise of a discretion committed to them under § 3 of the Railway Labor Act (44 Stat. 578, as amended, 45 U. S. C. § 153). Defendants further allege that the First Division is without jurisdiction over the disputes involved in Dockets Nos. 24211, 25597, 24034, 28223, and 25655; that their jurisdiction is limited to the making of awards with respect to disputes growing out of the interpretation or application of valid and binding agreements and that they are without jurisdiction of disputes concerning the validity of alleged agreements; that the disputes which are the subject of the above-numbered dockets grow out of the interpretation or application of the agreement alleged in para-

graph 6 of the complaint herein, the validity of which has been a subject of dispute between the parties to those dockets; that the said agreement was held to be invalid and not binding as alleged in paragraph 5 hereof; and that the holding of the California Supreme Court alleged in paragraph 5 hereof precludes defendants from assuming jurisdiction and is a sufficient basis for the actions of defendants as alleged in the complaint herein.

Defendants further allege that other objections to the jurisdiction of the First Division of the National Railroad Adjustment Board each of which is a sufficient basis for the actions of defendants alleged in the complaint herein have been made by the Board of State Harbor Commissioners in behalf of the State Belt Railroad of California in the submissions filed in the proceedings which are the subject matter of this complaint; that these objections are that the State of California as owner and operator of the State Belt Railroad of California is not subject to the provisions of the Railway Labor Act; that the agreement alleged in paragraph 6 of the complaint conflicts with provisions of the Constitution and Civil Service laws of the State of California and insofar as it does so was beyond the authority of the Board of State Harbor Commissioners to make; and that the agreement alleged in paragraph 6 of the complaint, if valid, constitutes an agreement under Section 3, Second of the Railway Labor Act (45 U. S. C. § 153, Second) to utilize the State Personnel Board for the purpose of adjusting and deciding disputes of the character involved in Dockets bearing Nos. 24211, 25597, 25034, 28223, and 25655. Defendants further allege that in the proceeding alleged in paragraph 5 hereof it was held by the California Supreme Court that the State Belt Railroad of California is not subject to the Railway Labor Act.

19. Defendants deny each and every allegation contained in paragraph 20 of the complaint and allege that
32 they have at all times acted and are acting lawfully in the performance of the duties imposed on them and committed exclusively to the members of the First Division of the Railroad Adjustment Board.

Wherefore, defendants pray judgment that the plaintiffs take nothing by reason of their complaint on file herein but that the same be dismissed with costs.

Kenneth F. Burgess.

Douglas F. Smith.

Richard L. Selle.

Attorneys for Defendants O. E. Swan.

H. W. Burtness, George H. Dugan.

T. L. Green, and H. J. Reeser.

Sidley, Austin, Burgess & Smith,

11 South La Salle Street,

Chicago 3, Illinois,

Of Counsel.

Acknowledgment of Service.

Receipt of a copy of the above Answer on this 17th day of March, 1953, is hereby acknowledged.

Adams, Williams & Turney.

Adams, Williamson & Turney.

Attorneys for Plaintiffs.

33 And afterwards on, to wit, the 27th day of November, 1953 came the State of California by its attorney and filed in the Clerk's office of said Court its certain Notices, Motion To Intervene As Defendant and Complaint In Intervention in words and figures following, to wit:

34 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—53-C-56)

**NOTICE OF MOTION BY STATE OF CALIFORNIA
TO INTERVENE.**

To: Adams Williamson & Turney, 39 South La Salle Street, Chicago 3, Illinois, Attorneys for Plaintiffs; and to Herbert Brownell, Jr., United States Attorney General, Washington 25, D. C., and Otto Kerner, Jr., United States Attorney, Chicago, Illinois, Attorneys for the United States of America:

Please take notice, that the undersigned will bring the attached motion by State of California to Intervene as

Defendant on for hearing before the above entitled court at Room 245, U. S. Court House, Chicago, Ill., on the 3rd day of December, 1953, at 10:00 o'clock of that day or as soon thereafter as counsel can be heard.

Dated: June 5, 1953.

Edmund G. Brown,
*Attorney General of the State
of California,*

Herbert E. Wenig,
*Deputy Attorney General,
Attorneys for the State of
California as Intervenor
and Cross-defendant.*

600 State Bldg.,
San Francisco 2, Calif.

35 Edmund G. Brown,
Attorney General of the State of California,

Herbert E. Wenig,
Deputy,

600 State Bldg.,
San Francisco 2, Calif.,
Tel.: UNDERhill 1-8700.

Attorneys for The State of California.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53-C-56) * *

MOTION BY STATE OF CALIFORNIA TO INTERVENE AS DEFENDANT.

1. The State of California, acting through its Attorney General, Edmund G. Brown, moves for leave to intervene as a defendant in this action in order to assert the defenses in its proposed answer, a copy of which is hereto attached.

2. The State of California, the real defendant party in interest, as owner and operator of the State Belt Railroad, is the employer of the plaintiffs.

3. The within action seeks to require the defendants, as members of the First Division of the National
36 Railroad Adjustment Board, and John M. MacLeod, as Executive Secretary of the First Division of the

said Board, to take jurisdiction of the cases described in the action and to issue awards and orders in said docket. Said awards would be issued against the applicant as employer of plaintiffs.

4. As defendant carrier members are nominal parties, representation of applicant's interests may be inadequate and the applicant may be bound by the orders and awards which the within action seeks to have the National Railroad Adjustment Board make.

5. The defense of the State of California to plaintiff's action presents both questions of fact and law which are common to the main action.

Edmund G. Brown,
*Attorney General of the State of
California,*

Herbert E. Wenig,
*Deputy Attorney General,
Attorneys for Applicant for
Intervention.*

37. Edmund G. Brown,
Attorney General of the State of California,

Herbert E. Wenig,
Deputy,
600 State Bldg.,
San Francisco 2, Calif.,
Tel.: UNDERhill 1-8700,
Attorneys for The State of California.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—53-C-56) • •

COMPLAINT IN INTERVENTION.

The State of California, acting by its Attorney General Edmund G. Brown, by way of answer admits, denies and alleges, as follows:

First Defense.

The complaint fails to state a claim against defendants or against Intervenor as the real party in interest upon which relief can be granted.

○ **Second Defense.**

The court lacks jurisdiction over the subject matter heard for the reason that:

38 1. The action seeks to require the First Division of the National Railroad Adjustment Board to issue decisions and orders in the dockets described in the complaint in favor of individual plaintiffs and against the State of California as the owner and operator of the State Belt Railroad. The State of California has not consented to be sued before the said Board or in this court. Both the petitions to the Board and the within action are barred by the Eleventh Amendment to the Federal Constitution.

2. The action is not authorized under the Railway Labor Act (45 USC sec. 151, et seq.), or otherwise under the laws of the United States.

3. There is no valid agreement upon and under which the First Division of the said Board may proceed to act upon the said petitions of plaintiffs.

: **Third Defense.**

Intervenor admits the allegations contained in paragraphs 1 and 2 of the complaint, except it denies that defendants are acting in their individual capacities with respect to the matters herein mentioned.

1. Denies that plaintiffs' right to relief arises out of the same occurrences and transactions; but admits that questions of law and fact common to the rights of each of the plaintiffs are involved in this action.

2. Denies each and every allegation contained in paragraph 4 of the complaint.

3. Admits the allegations of paragraph 5 of the complaint except that Intervenor neither admits nor denies the conclusions of law asserted in said paragraph or the meaning or effect of the decisions referred to in said paragraph 5.

4. Intervenor alleges that the collective bargaining agreement referred to in paragraph 4 of the complaint is invalid under the laws of the State of California for the reason that at the time of the alleged execution of the said alleged agreement the members of the Board of State Harbor Commissioners for San Francisco Harbor possessed no authority to enter into and

39

make the said agreement nor lawfully to make it binding upon the State of California. The invalidity of said agreement has been conclusively determined by the Supreme Court of Intervenor in *State of California v. Brotherhood of Railroad Trainmen, etc.*, (37 Cal. 2d 412, 323 Pac. 2d 857); cert. denied, 342 U. S. 876).

Intervenor further alleges that the parties and subject matter of the said agreement are not within the scope of the Railway Labor Act and that said agreement, even if valid, is not one of the agreements which said Act places within the jurisdiction of the National Railroad Adjustment Board.

5. Referring to paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, Intervenor alleges that the rights of employment and to compensation and conditions of work are all matters which are established by the laws of the State of California, particularly the civil service laws of Intervenor and that no rights with respect to any of the matters referred to in the complaint were acquired by plaintiffs under the said collective bargaining agreement. The said First Division of the National Railroad Adjustment Board possesses no jurisdiction to entertain the said petitions of plaintiffs nor to proceed to decide and make awards with respect to the subject matter contained in said petitions against Intervenor.

6. Referring specifically to paragraphs 9, 11, 14, 16, and 18, Intervenor alleges that the said petitions were docketed by the Secretary of the First Division without authority of law.

7. Intervenor denies that plaintiffs have any right or rights under the provisions of the Railway Labor Act to have their respective petitions considered and decided by the defendant members or any of the other members of the said First Division, and to have awards rendered accordingly. In this respect, Intervenor alleges that the actions or alleged contemplative refusal of the defendant carrier members of the First Division to consider and decide plaintiffs' petitions are lawful and proper.

8. Referring to the allegations of paragraph 20 of the complaint, Intervenor denies that plaintiffs are without a judicial or administrative remedy.

Fourth Defense.

If the agreement described in paragraph 6 of the complaint is valid, nevertheless the said First Division is without jurisdiction to consider and decide the dispute involved in the dockets described in the said complaint because the provisions of said agreement provide for the settlement of said disputes by the State Personnel Board of Intervenor pursuant to the provisions of section 3, Second, of the Railway Labor Act (45 USC sec. 153 (Second)).

Wherefore, Intervenor prays that judgment be entered in favor of defendants, and that plaintiffs take nothing by reason of their complaint:

Edmund G. Brown,
*Attorney General of the State of
 California,*
 Herbert E. Wenig,
*Deputy Attorney General,
 Attorneys for The State of
 California.*

(Acknowledgment of Service Attached But Not Copied):

41 And afterwards, to wit, on the 3rd day of December, 1953, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Julius J. Hoffman, District Judge, appears the following entry, to wit:

42 IN THE DISTRICT COURT OF THE UNITED STATES.
 * * (Caption—53-C-56) * *

ORDER GRANTING LEAVE TO STATE OF CALIFORNIA TO INTERVENE AND AUTHORIZING PLEADING TO BE CONSIDERED AS ANSWER.

This cause coming on to be heard on the motion of the State of California to intervene as a defendant in this action, all parties being represented before the Court, and the Court having considered said motion and the answer tendered therewith, and it appearing that counsel for all parties are agreed to the intervention in accord-

ance with the motion except that counsel for plaintiffs wish (1) to limit their agreement to a permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, (2) to reserve the question as to intervention of right under Rule 24(a), (3) to reserve the right to move to strike any portion of the answer of the State of California after the Court's disposition of a motion the plaintiffs may hereafter file to strike from the answer of the carrier member defendants any portions thereof, and the Court being fully advised in the premises, it is

43 Ordered, that the State of California have leave to intervene as a defendant in this cause and is hereby made a party hereto, the question whether the said party is entitled to the status of an intervener of right under Rule 24(a) of the Federal Rules of Civil Procedure, as asserted in its aforesaid motion, as well as to that of a permissive intervener under Rule 24(b), being reserved for determination when and if the distinction shall become material to a determination of the scope of its right as a party:

Further Ordered that the pleading accompanying the aforesaid motion of the State of California stand as its answer to the Complaint herein, subject to the right of the plaintiffs to move to strike any portion thereof after the Court's disposition of a motion the plaintiffs may hereafter file to strike from the answer of the carrier member defendants any portions thereof.

Julius J. Hoffman,

Judge.

Dated: December 3, 1953.

Approved:

Richard L. Selle,

*For carrier member defendants
and State of California.*

Anthony Scariano,

Asst. U. S. Atty. for NRAB.

Burke Williamson,

For plaintiffs.

44 And afterwards on, to wit, the 5th day of February 1954, came the First Division of the National Railroad Adjustment Board, John M. MacLeod, as Executive Secretary of the Division and the United States of America, by their attorneys; and filed in the Clerk's office of said Court their certain Motion for Summary Judgment, in words and figures following, to wit:

45 IN THE UNITED STATES DISTRICT COURT.
 * * (Caption—53-C-56) * *

MOTION FOR SUMMARY JUDGMENT.

The First Division of the National Railroad Adjustment Board, John M. MacLeod, as Executive Secretary of the Division and the United States of America, move the Court, pursuant to Rule 56, of the Federal Rules of Civil Procedure, for a summary judgment in the case in favor of the plaintiffs, on the ground that there is no genuine issue as to any material fact and that the plaintiffs are entitled to a judgment as a matter of law. A Memorandum in support of this motion is filed herewith.

James E. Kilday,
 Frank J. Oberg,
*Special Assistants to the
 Attorney General.*

Stanley N. Barnes,
Assistant Attorney General;
 Irwin N. Cohen,
United States Attorney.

46 Certificate of Service.

I certify that a true copy of the foregoing motion for summary judgment was served by mailing this day of January, 1954 to counsel for all parties of record in this action.

Irwin N. Cohen,
United States Attorney.

Dated this day of January, 1954.

(Memorandum In Support Of Motion For Summary Judgment Attached But Not Copied:).

47 And on the same day, to wit, the 5th day of February, 1954, came the State of California by its attorneys and filed in the Clerk's office of said Court its certain Motion for Summary Judgment in words and figures following, to wit:

48 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—53-C-56) * *

MOTION FOR SUMMARY JUDGMENT.

The State of California, acting through its Attorney General, Edmund G. Brown, as defendant in intervention, moves the court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for a summary judgment in favor of the State of California as defendant in intervention on the ground that there is no genuine issue as to any material fact, and that the defendant in intervention is entitled to a judgment as a matter of law.

February 2, 1954.

Edmund G. Brown,
*Attorney General of the State of
California,*

Herbert E. Wenig,
*Assistant Attorney General,
Attorneys for State of California,
600 State Building,
San Francisco 2, California.*

49 I certify that a true copy of the foregoing Motion for Summary Judgment was served by mail, this 2nd day of February, 1954, on counsel for all parties of record in this action.

Dated this 2nd day of February, 1954.

Herbert E. Wenig,
*Assistant Attorney General of
the State of California.*

(Receipt of Service Attached But Not Copied:)

50 And afterwards on the same day, to wit, the 5th day of February, 1954, came the Defendants, O. E. Swan, et al., by their attorneys and filed in the Clerk's office of said Court their certain Motion for Preliminary Hearing, in words, and figures following, to wit:

51 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—53-C-56) * *

MOTION FOR PRELIMINARY HEARING.

Defendants O. E. Swan, H. W. Burtness, George H. Dugan, T. L. Green and H. J. Reeser, the carrier members of the First Division of the National Railroad Adjustment Board, move the court to hear and determine before trial the First and Second defenses pleaded in defendant's answer herein, and to dismiss the action with costs to the defendant, on the ground that the issues raised by the said defenses may be determined separately from the other issues in the case and that if the said issues are decided in defendant's favor the action should be dismissed.

Kenneth F. Burgess,
Douglas F. Smith,
Richard L. Selle,

*Attorneys for Defendants O. E.
Swan, H. W. Burtness, George
H. Dugan, T. L. Green, and
H. J. Reeser.*

Sidley, Austin, Burgess & Smith,
11 South La Salle Street,
Chicago 3, Illinois,
Of Counsel.

52 And afterwards on, to wit, the 29th day of April, 1954, came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation and Documents Filed in Accordance With Said Stipulation, in words and figures following, to wit:

(Documents transmitted Separately for convenience in one envelope:)

53 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—53-C-56) • •

STIPULATION.

It is hereby stipulated by and between the attorneys for the plaintiffs, and the attorneys for the defendants O. E. Swan, H. W. Burtness, George H. Dugan, T. L. Green, and H. L. Reeser and the attorneys for the First Division of the National Railroad Adjustment Board, John M. MacLeod, as Executive Secretary of the Division, and the United States of America that the following documents, certified by the Executive Secretary, First Division, National Railroad Adjustment Board to be true and correct copies of documents on file and of record in his office, are true and correct copies of such documents, may be filed herein and may be considered by the Court in its disposition of the motion for summary judgment filed herein by the First Division of the National Railroad Adjustment Board, John

54 M. MacLeod, as Executive Secretary of the Division, and the United States of America except that objections may be made on brief or otherwise to the relevancy or materiality of any of such documents and shall have the same force and effect as if made when the evidence was offered:

1. Docket 24,211

(a) Petitioner's Ex Parte Submission.

(b) Telegram dated March 30, 1949, signed by Robert H. Wylie, Port Manager.

2. Docket 25,034

(a) Petitioner's Ex Parte Submission together with Exhibits "A" through "O" thereto.

- (b) Management's Submission, together with Exhibits 1 through 9 thereto.

3. Docket 25,597

- (a) Petitioner's Ex Parte Submission.
- (b) Management's Submission.

4. Docket 25,655

- (a) Petitioner's Ex Parte Submission, together with Exhibit "A" thereto.
- (b) Management's Submission.

5. Docket 28,223

- (a) Petitioner's Ex Parte Submission, together with Exhibits "A" and "B" thereto.
- (b) Carrier's Answer to Petitioner's Ex Parte Submission.
- (c) Employees' Reply to Carrier's Answer to Petitioner's Ex Parte Submission.

6. Dockets 24,109 and 24,211

- (a) Letter dated February 25, 1952, addressed to the Labor Members and signed by T. L. Green for the Carrier Members.
- (b) Letter dated January 30, 1952, addressed to Messrs. D. B. Robertson and W. P. Kennedy and signed by J. M. MacLeod, Executive Secretary.
- (c) Letter dated January 22, 1952, addressed to Mr. J. M. MacLeod, Executive Secretary, headed "Re: California State Belt Railroad" and signed by D. B. Robertson, President Locomotive Firemen & Enginemen and W. P. Kennedy, President of Railroad Trainmen.
- (d) Letter dated January 16, 1952, addressed to Messrs. D. B. Robertson and W. P. Kennedy and signed by J. M. MacLeod, Executive Secretary.
- (e) Memorandum dated December 27, 1951, addressed to Mr. W. C. Lash, Chairman, Mr. T. L. Green, Vice Chairman, with copy to other members, headed "Re: State Belt Railroad (California)," and signed by J. M. MacLeod, Executive Secretary.
- (f) Letter dated December 19, 1951, addressed to Executive Secretary, First Division, National Railroad Adjustment Board and signed by Robert H. Wylie, Port Manager.

55 (g) Except from Weekly Information Bulletin, The American Short Line Railroad Association headed "2. U. S. Supreme Court Action."

Burke Williamson,
Attorney for Plaintiffs.

Richard L. Selle,
*Attorney for Defendants O. E. Swan,
H. W. Burtness, George H. Dugan,
T. L. Green, and H. J. Reeser.*

R. Ticken,
*United States Attorney, Attorney for
the First Division of the National
Railroad Adjustment Board, John
M. MacLeod, as Executive Secre-
tary of the Division and the United
States of America.*

56 And on the same day, to wit, on the 29th day of April, 1954, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Julius J. Hoffman District Judge, appears the following entry, to wit:

57 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—53-C-56) * *

On stipulation of the parties by their counsel filed herein it is

Ordered that the documents listed in the said stipulation may be filed herein and may be considered by the Court in its disposition of the motion for summary judgment filed herein by the First Division of the National Railroad Adjustment Board, John M. MacLeod, as Executive Secretary of the Division and the United States of America.

Motion for Summary Judgment.

58 And afterwards on, to wit, the 21st day of July, 1954 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Motion For Summary Judgment with the Respective Affidavits of John M. MacLeod, A. N. Williams, and W. L. Dage, in words and figures following, to wit:

59 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—53-C-56) * *

PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT.

Harry Taylor, Peter A. Calus, James W. Brewster, William J. Langston, and H. C. Greer, Plaintiffs herein, move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for a summary judgment in the case in favor of the plaintiffs, on the ground that there is no genuine issue as to any material fact and that the plaintiffs are entitled to a judgment as a matter of law. Affidavits and a brief in support of this motion are filed herewith.

Burke Williamson,
Adams Williamson & Turney,
39 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Plaintiffs.

July 21, 1954.

(60) IN THE DISTRICT COURT OF THE UNITED STATES.
* * * (Caption—53-C-56) * *

**AFFIDAVIT OF JOHN MACLEOD WITH RESPECT
TO PLAINTIFFS' MOTION FOR SUMMARY JUDG-
MENT.**

District of the United States, }
State of Illinois. } ss.

John M. MacLeod, being first duly sworn, on oath de-
clares that:

1. He is Executive Secretary of the First Division of
the National Railroad Adjustment Board, with offices at
39 South La Salle Street, Chicago, Illinois.

2. He is of legal age.

3. He makes the within Affidavit with respect to the
motion of the plaintiffs herein for summary judgment.

4. He makes this Affidavit on personal knowledge.

5. As Executive Secretary of the First Division of the
National Railroad Adjustment Board he has custody of its
files and records.

6. On March 31, 1949 the First Division of the National
Railroad Adjustment Board rendered its Award No. 12732
in Docket No. 22826, a true and correct copy of which
Award is attached hereto marked "Exhibit A" and made
a part hereof.

61 7. On January 24, 1951 the First Division of the
National Railroad Adjustment Board rendered its
Award No. 14210 in Docket No. 23664, a true and correct
copy of which Award is attached hereto marked "Exhibit
B" and made a part hereof.

John M. MacLeod.

State of Illinois, {
County of Cook. } ss.

Subscribed and sworn to before me this 28th day of
June, 1954.

(Seal)

Margaret J. Smith,
Notary Public.

My Commission Expires Aug. 12, 1954.

Exhibit A.

Award No. 12733

Docket No. 22826

First Division

National Railroad Adjustment Board.

39. South La Salle St., Chicago 3, Illinois.

The First Division consisted of the regular members and in addition Referee Sidney St. F. Thaxter when award was rendered.

Parties to Dispute:

Brotherhood of Railroad Trainmen,
California State Belt Railroad.

Statement of Claim: Claim of Yardman James W. Brewster, dated July 1, 1947, for reinstatement with full seniority rights unimpaired with pay for all time lost.

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute waived hearing thereon.

The powers of the National Railroad Adjustment Board are derived solely from statute. Section 3(i) of the Railway Labor Act provides that disputes "shall be handled in the usual manner up to and including the chief operating officer of the Carrier designated to handle such disputes" and only when an adjustment is not reached in that manner does this Division have jurisdiction to hear a dispute.

The record should affirmatively show that such condition precedent has been complied with. This record does not so indicate; and the claim should be dismissed without prejudice in order that this defect may be corrected.

Award.

Claim dismissed without prejudice.

By Order of First Division

National Railroad Adjustment Board

Attest: T. S. McFarland,

Executive Secretary.

Dated at Chicago, Illinois, this 31st day of March, 1949.

63

Exhibit B.

Award No. 14210

Docket No. 23664

First Division

National Railroad Adjustment Board.

39 South La Salle St., Chicago 3, Illinois.

Parties To Dispute:

Brotherhood of Locomotive Firemen and Enginemen.

California State Belt Railroad Company.

Statement of Claim: Claim of Fireman Peter A. Calus for one day's pay at time and one-half and one day's pay at straight time firemen's rate on November 30, 1946, on account of being called in advance of his regular starting time.

Claim is also made for all regular assigned Engineers and Firemen, who on subsequent dates were required to perform service under like circumstances.

Employes' Statement of Facts: Fireman Calus was holding a regular assignment in yard service, hours of assignment 3:00 P. M. to 11:00 P. M. and on November 30, 1946, Fireman Calus was called for extra yard service to report for duty at 9:30 A. M., 5 hours and 30 minutes in advance of his regular starting time 3:00 P. M. He performed service on the extra yard assignment 9:30 A. M. to 3:00 P. M. and on his regular assignment 3:00 P. M. to 5:30 P. M.

Peter A. Calus holds seniority rights as fireman on the California State Belt Railroad. The said railroad is owned by the State of California and is operated by the Board of State Harbor Commissioners for the Port of San Francisco.

The railroad is what would ordinarily be classed as industrial and switching railroad. It serves the wharves and industries in and about San Francisco and makes connections with other common carrier railroads. All crews are yard crews and are not restricted to work at a given point, but may be required to work anywhere on the railroad. Continuous twenty-four hour switching is maintained on this property.

This case is submitted ex parte, carrier having declined to joint submission as evidenced by Exhibits "A" and "B" attached.

Position of Employees: This claim is based on the provisions of Article 1, Section 1, Article 2, Section 1, Article 3, Section 1, Article 4, Section 1, Article 5, Section 1, Article 7, Sections 1 and 4, current Schedule of Rates of Pay and Working Conditions, covering Locomotive Engineers, Firemen and Hostlers between the State Belt Railroad and Brotherhood of Locomotive Firemen and Enginemen, effective September 1, 1942, reading as follows:

Article 1

Rates of Pay

(Rates omitted to save space)

Article 2

Basic Day

Section 1. Eight hours or less shall constitute a day's work; time to begin when required to report for duty and to end at time released from all duty. Registering on and off duty, and making out reports, shall be considered as time on duty.

Article 3

Overtime

Section 1. Except when exercising seniority rights from one assignment to another, all time worked in excess of eight hours in a 24-hour period, shall be paid for as overtime on the minute basis, at one and a half times the hourly rate.

Article 4

Assignments

Section 1. Enginemen and yardmen shall be assigned for a fixed period of time, which shall be for the same hours daily for all regular members of a crew. So far as it is practicable, assignments shall be restricted to eight hours' work.

Article 5

Bulletining Vacant Positions

Section 1. All new assignment positions, or a permanent vacancy on a regular assignment, or a temporary vacancy of fifteen (15) days or more, shall be advertised by bulletin for a period of forty-eight (48) hours and the senior qualified man making application shall be assigned.

Article 7

Starting Time

Section 1. Regularly assigned crews shall each have a fixed starting time, and the starting time for a crew will not be changed without at least forty-eight (48) hours' advance notice.

Section 4. Should a condition arise whereby it is considered necessary to start a regular engine at time other than that prescribed by the provisions of this article, the chairman of the committees representing the engine and yard service employes will meet with proper representatives of the State Belt Railroad for the purpose of considering and adjusting same.

The employes contend that claimant is entitled to 8 hours at overtime rates for service performed 9:30 A. M. to 3:00 P. M. on November 30, 1946 in accordance with Article 1, Section 1, Article 2, Section 1 and Article 3, Section 1 and further contend that claimant is entitled to 8 hours at straight time rates November 30, 1946 on account of performing service 3:00 P. M. to 5:30 P. M. on his regular assignment in accordance with Article 1, Section 1, Article 2, Section 1, Article 4, Section 1, Article 5, Section 1 and Article 7, Sections 1 and 4.

In further support of the employee's position, we quote statement of claim and facts submitted by B. of R. T. on the same joint schedule rules, docketed by your Board as Docket No. 20877, which claims the carrier paid as evidenced by Exhibit "C", attached.

"Statement of Claim: Ex parte submission of the Brotherhood of Railroad Trainmen in claim of Engine Foreman F. F. Gentry, Helpers J. W. Brewster and E. S. Baugh, for additional compensation, September 7, 1944.

Statement of Facts: Claimants, regularly assigned to Job No. 8, hours of assignment 3:00 P. M. to 11:00 P. M., performed service on assignment September 6, 1944, 3:00 P. M. to 11:00 P. M. On September 7, 1944 claimants were brought on duty 1:00 P. M. performed extra service until 3:00 P. M., then continued on regular assignment until 11:00 P. M.

Claim was made for 8-hours at overtime rate for service performed 1:00 P. M. to 3:00 P. M. and 8-hours at pro rata rate for service performed on regular assignment 3:00 P. M. to 11:00 P. M., which was declined by the carrier, and 2-hours at overtime rate computed from 1:00 P. M. to 3:00 P. M., 8-hours at pro rata rate computed from 5:00 P. M. to 3:00 P. M. allowed."

After settlement was made in accordance with Exhibit "C", Docket No. 20877 was withdrawn by the B. of R. R. Chairman.

We also respectfully direct the Board's attention to First Division Awards: 544, 5122, 10937 and 11221.

In view of the foregoing facts, schedule rules and Board Awards, your Honorable Board is respectfully requested to render an affirmative award.

Conferences were held with the Management and all information contained herein furnished them.

Oral hearing is not desired unless requested by the carrier.

(Exhibits not reproduced.)

Carrier's Statement (See Letter Below):

Earl Warren
Governor

Board of State Harbor Commissioners
for the
Port of San Francisco
Ferry Building
San Francisco 6
5 November 1948

National Railroad Adjustment Board
First Division
39 La Salle Street
Chicago 3, Illinois

Attention: Mr. T. S. MacFarland
Executive Secretary

Gentlemen:

In response to your letter of October 13th, 1948, File C-584, this will advise you that the Board of State Harbor Commissioners does not intend to file a submission in the exparte case of Fireman Peter A. Calus.

Yours very truly,

/s/ Robt. H. Wylie,
Port Manager.

cc to Mr. D. B. Robertson, Pres., BLF&E

Mr. A. N. Williams, Gen. Chmn., BLF&E, C.S.B. RR

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute waived hearing thereon.

The carrier in this case has refused to file any submission.

The petitioner reproduces a letter of August 20, 1947, addressed to an officer of the Organization by the Port Manager, dealing with claims said to be similar in principle to that presented here. The Port Manager, there, agreed to make payment on the basis here demanded.

Motion for Summary Judgment.

There appearing no reason why the interpretation of the rule cited, adopted by the carrier by its letter of August 20, 1947, is not applicable to the claim of Fireman Calus for November 30, 1946, his claim for that date is sustained on the basis of the carrier's interpretation.

Claims for other engineers and firemen for subsequent dates are too vague and indefinite for this Division to pass upon and they are dismissed.

Award

Claim of Fireman Calus for November 30, 1946, sustained.

Other claims dismissed.

By Order of First Division
National Railroad Adjustment Board

Attest: /s/ T. S. McFarland,
Executive Secretary.

Dated at Chicago, Illinois, this 24th day of January, 1951.

64 . IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—53-C-56) * *

**AFFIDAVIT OF A. N. WILLIAMS IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDG-
MENT.**

District of the United States, }
State of California, } ss.

A. N. Williams, being first duly sworn, on oath declares that:

1. He resides at 930 Bay Street, San Francisco 9, California.
2. He is of legal age.
3. He makes the within Affidavit in support of the motion of the plaintiffs herein for summary judgment.
4. He makes this Affidavit on personal knowledge.
5. He is Chairman of the General Grievance Committee of the Brotherhood of Locomotive Firemen and En-

ginemen on the State Belt Railroad of California, the carrier referred to in the Complaint filed herein.

6. A written collective bargaining agreement was entered into effective September 1, 1942 by and between the Board of State Harbor Commissioners, which owns and operates the State Belt Railroad of California, and the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen, which established rates of pay, rules and working conditions of the class or credit of locomotive firemen, of locomotive engineers, and of trainmen employed by that carrier. In the rendering of services by said classes or crafts of employees to the State Belt Railroad of California the rates of pay, rules and working conditions established by said collective bargaining agreement were observed by the parties thereto from September 1, 1942 until on or about November 13, 1951, except for some disputes which arose.

7. The plaintiffs Harry Taylor and Peter A. Calus rendered services as locomotive firemen and engineers to the State Belt Railroad of California and were paid for their services in the amounts provided in said collective bargaining agreement which became effective September 1, 1942 and disputes arose between said employees and said carrier, all as alleged in paragraphs 7, 8, 9, 10, and 11 of the Complaint filed herein.

A. N. Williams.

State of California; }
County of Alameda. } ss.

Subscribed and sworn to before me this 2nd day of July, 1954.

(Notarial Seal)

Doris Anderson,
Notary Public.

66 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—53-C-56) * *

**AFFIDAVITS OF W. L. DAGE IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDG-
MENT.**

District of the United States, { ss.
State of California.

W. L. Dage, being first duly sworn, on oath declares that:

1. He resides at 332 Prentiss Street, San Francisco, California.

2. He is of legal age.

3. He makes the within Affidavit in support of the motion of the plaintiffs herein for summary judgment.

4. He makes this Affidavit on personal knowledge.

5. He is Chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen on the State Belt Railroad of California; the carrier referred to in the Complaint filed herein.

6. A written collective bargaining agreement was entered into effective September 1, 1942 by and between the Board of State Harbor Commissioners, which owns and operates the State Belt Railroad of California, and the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen, which established rates of pay, rules and working conditions of the class or craft of locomotive firemen, of locomotive engineers, and of trainmen employed by that carrier.

67 In the rendering of services by said classes or crafts of employees to the State Belt Railroad of California the rates of pay, rules and working conditions established by said collective bargaining agreement were observed by the parties thereto from September 1, 1942 until on or about November 13, 1951, except for some disputes which arose.

7. The plaintiffs James W. Brewster, William J. Langston, and H. C. Greer rendered services as trainmen to the State Belt Railroad of California and were paid for their services in the amounts provided in said collective bargaining agreement which became effective Sep-

tember 1, 1942 and disputes arose between said employees and said carrier, all as alleged in paragraphs 12, 13, 14, 15, 16, 17, and 18 of the Complaint filed herein.

W. L. Dage.

State of California,
City and County of San Francisco. } ss.

Subscribed and sworn to before me this 9th day of July, 1954.

(Notarial Seal)

Margaret W. Gilmore,
Notary Public.

My Commission Expires November 3, 1956.

68 And afterwards, to wit, the 16th day of December, 1954 came the State of California, Intervenor by its attorneys and filed in the Clerk's office of said Court its certain Motion for Judgment on the Pleadings for Failure to Join Indispensable Parties, in words and figures following, to wit:

69 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—53-C-56) * *

**MOTION FOR JUDGMENT ON THE PLEADINGS
FOR FAILURE TO JOIN INDISPENSABLE PAR-
TIES.**

State of California, intervenor on behalf of defendants, moves the Court to enter judgment on the pleadings in favor of defendants and said intervenor upon the ground and for the reason that the Court, in addition to the other grounds heretofore asserted in intervenor's motion for summary judgment, lacks jurisdiction of the cause of action in that the said action fails to join as indispensable parties the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen. Motion is based upon the pleadings, the stipulated facts, records, affidavits, other papers on file herein, and the memorandum in support of this motion.

Said intervenor further moves that this motion be heard and determined at the same time, place and date

Order re: Parties to Stipulation.

as set by this Court for the hearing of the various motions for such summary judgment but that this said motion be heard and decided before the other of said motions and trial of the cause.

Dated: December ____, 1954.

Edward M. White,
160 North LaSalle St.,
Room 900,
Chicago, Illinois,
Attorney for State of California, Intervenor in favor of Defendant.

Edmund G. Brown,
Attorney General of the State of California.

Herbert E. Wenig,
Assistant Attorney General.
600 State Building,
San Francisco 2, California,
Of Counsel.

70 And afterwards, to wit, on the 20th day of December, 1954, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Julius J. Hoffman, District Judge, appears the following three entries; to wit:

71 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—53-C-56) * *

On stipulation by and between the plaintiffs and the defendants O. E. Swan, H. W. Burtness, George H. Dugan, T. L. Green, and H. L. Reeser by their respective attorneys and the attorneys for the First Division of the National Railroad Adjustment Board, John H. MacLeod, as Executive Secretary of the Division and the attorney for the State of California, intervenors it is

Ordered that the State of California shall be made a party to the stipulation heretofore filed herein on April 29, 1954.

72

IN THE UNITED STATES DISTRICT COURT.

(Caption—53-C-56) * *

This cause coming on for hearing on the motion of State of California for judgment on the pleadings for failure to join indispensable parties and the Court now having heard the arguments of counsel said motion hereby is taken under advisement.

73

IN THE UNITED STATES DISTRICT COURT.

(Caption—53-C-56) * *

This cause coming on for hearing of oral argument of the plaintiffs, defendants and the intervenor come the parties by their counsel and the Court now having heard the arguments of counsel on the motions of the plaintiffs, United States of America and State of California for summary judgment said motions hereby are taken under advisement.

74 And afterwards, to wit, on the 4th day of February, 1955, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Julius J. Hoffman, District Judge, appears the following entry, to wit:

75 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-56) * *

On motion of the State of California by its counsel it is Ordered that leave be and hereby is given to the State of California to file affidavit in support of motion for summary judgment consisting of partial record and known as the agreed statement of facts on appeal in the cause entitled State of California vs. Brotherhood of Railroad Trainmen, et al., a cause lately pending in said Court.

76 And afterwards on, to wit, the 7th day of February, 1955 there was filed in the Clerk's office of said Court a certain Supplemental Affidavit of Edward M. White, in Support of Intervenor's Motion for Summary Judgment, With Agreed Statements on Appeal by Appellant, Respondents, and Intervenors, In Lieu of Clerk's and Reporter's Transcript In Case No. S F 18003, State of California *vs.* Brotherhood of Railroad Trainmen, et al., Attached Thereto, in words and figures following, to wit:

77 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—53,C-56) * *

**SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF
INTERVENOR'S MOTION FOR SUMMARY JUDG-
MENT FILED WITH LEAVE OF COURT.**

Edward M. White being duly sworn on oath deposes and says:

1. That he is the attorney for the State of California intervenor herein.

2. That the State of California has heretofore filed herein a motion for summary judgment.

3. That in support of said motion there is attached hereto a certified copy of "Agreed Statements on Appeal by Appellant, Respondents and Intervenor in lieu of Clerk's and Reporter's Transcript in case S. F. 18003, State of California *vs.* Brotherhood of Railroad Trainmen, et al. and David T. Lock, Intervenor."

Edward M. White,

Attorney for the State of California.

Subscribed and sworn to before me this 7th day of February, A. D. 1955.

(Seal)

Mary Griffin,
Notary Public.

80 IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA

In and for the City and County of San Francisco.

State of California, *Plaintiff,*

vs.

Brotherhood of Railroad Trainmen,
an unincorporated association, and
Brotherhood of Locomotive Firemen
and Enginemen, an unincorporated
association, } No. 372550.

Defendants.

David T. Lock,

Intervener.

AGREED STATEMENT OF APPELLANT AND RE-
SPONDENTS IN LIEU OF CLERK'S AND RE-
PORTER'S TRANSCRIPT ON APPEAL.

(Filed July 15, 1949. Martin Monga, Clerk.)

By J. P. Perusio, Deputy Clerk.)

This agreed statement is made pursuant to Rule 6(A) of
the Rules on Appeal, upon an appeal from a declaratory
judgment rendered by the Superior Court in and for the
City and County of San Francisco. The essential question
concerns the application of the Railway Labor Act (45
U. S. C. 151, et seq.) to the operation by the State of Cali-
fornia of the State Belt Railroad, the status and rights of
State employees employed upon that railroad, and the
validity of a collective bargaining contract made by
81 the Board of State Harbor Commissioners for San
Francisco Harbor.

Facts.

The following facts are necessary to a determination of
the questions on this appeal:

1. Ownership of Harbor of San Francisco.

The Harbor of San Francisco, hereinafter called the "Harbor," with its piers, terminals and other harbor and cargo facilities is owned by the State of California and is operated on a non-profit basis for the purpose of facilitating the commerce of the State and the International and coast-wise water traffic of the port.

2. Board of State Harbor Commissioners for San Francisco Harbor.

Management and control of the property and operations of the Harbor is under the Board of State Harbor Commissioners for San Francisco Harbor, hereinafter called the "Board." The Board is an instrumentality of the government of the State of California and its authority, powers and duties are defined in the Harbors and Navigation Code of the said State. It is composed of three commissioners appointed by the Governor by and with the consent of the State Senate. The Board may make reasonable rules and regulations concerning the control and management of the Harbor and may fix and regulate charges for the use of the facilities of the Harbor and for the services rendered by the said Board. These charges shall

82 not be any greater than is necessary to enable the Board to perform the duties required, or to exercise the powers authorized and to provide for interest and redemption requirements for bonds issued for Harbor purposes. (Sec. 3084 Harbors & Navigation Code.)

The revenues received are deposited monthly in the State Treasury and credited to the account of the San Francisco Harbor Improvement Fund. The funds available to the Board are appropriated by the State Legislature as part of the regular State budget, and must be expended in accordance with State budgetary laws.

3. State Belt Railroad.

The Board of State Harbor Commissioners for San Francisco Harbor, operates, as part of the facilities of the Harbor, the State Belt Railroad, hereinafter called the "Belt". This railroad is entirely owned by the State of California and the road-bed and trackage are situated entirely within the City and County of San Francisco. It

facilitates the freight traffic of the Harbor by moving freight cars from and to the piers, wharves and industrial plants and receives them from or delivers them to other carriers. The Belt parallels the water-front of San Francisco and extends on to some 45 wharves and serves directly some 175 industrial plants. It has track connections with freight car ferries, steamship docks, three interstate rail carriers, the United States Government tracks in the

Presidio of San Francisco and those extending on to 83 the United States Transport docks at Ft. Mason. It receives and transports from one to the other by its own engines and over its own tracks, all freight cars loaded and empty, offered by railroads, steamship companies, industrial plants and the United States Government. A large number of these cars either originate in States other than California or are destined to consignees in other States.

A considerable portion of the freight and cargo which is carried by the Belt and is moved through the Harbor, originates in or is destined for foreign countries. Excepting for an occasional use of the tracks by one of the interstate carriers at one end of the Belt Line tracks, no other railroad hauls its cars upon the tracks of the Belt.

The Belt makes a flat charge for moving a car between two points, the rate for a loaded car being a little higher than for an empty car. Such charges are uniform without any consideration as to point of origin, destination, or type of freight. The Belt is not a party to any through rate for the transportation of cars or any shipment between point of origin and final destination, nor does the Belt move same on any through waybill.

The said charges made for the services rendered by the Belt are fixed by the Board pursuant to the authority conferred upon it by the Harbors and Navigation Code of the State of California. The said Code authorizes the Board to collect such an amount of revenue as will enable it to perform its duties and expressly limits the amount of 84 money to be collected by such charges to a sum sufficient to meet the operating expenses of said Board.

The revenues received are deposited in the State Treasury by the State Controller, where they are credited along with other revenues of the Harbor to the San Francisco Harbor Improvement Fund. The Belt is not an incorporated company or a designated agency of the State, but is one of the

instrumentalities of the Board used in operating the Harbor. Tariffs of the Belt are filed with the Interstate Commerce Commission. Interstate Commerce Commission Terminal Tariff No. 4(A) is the effective tariff at this time. It became effective on October 14, 1942, and is on file with the Interstate Commerce Commission.

4. Status of Employees.

"By the terms of the California Constitution, all employees of the State, with certain exceptions, are members of the State Civil Service. Said employees engaged upon the work of the Harbor, including those employed on the Belt, are not within the exceptions. (Constitution, State of California, Art. XXIV, sec. 4; Gov. Code secs. 18500 to 19765, inclusive.)

Appointment to positions on the Belt are made in accordance with the civil service laws of the State of California and the rules and regulations of the State Personnel Board. Appointments to new positions or vacancies are made from eligible lists composed of persons who have successfully passed competitive examinations conducted by the State Personnel Board for the various classifications of employment. As is the case with all other State employees, those persons employed upon the work of the Belt are required to take an oath that they will support the Constitution of the United States and the Constitution of the State of California, and will faithfully discharge the duties of their respective positions.

Employees of the State Belt are paid from the San Francisco Harbor Improvement Fund.

The number of State employees engaged in the State Belt range from 125 to 225, depending upon the amount of work available, while approximately 425 other State employees, members of the State Civil Service System, are engaged upon other non-railroad work of the San Francisco Harbor.

5. Status of Defendants.

The defendants have authorizations from 50 of the State employees engaged upon the work of the State Belt authorizing the defendants to represent them in collective bargaining concerning wages and other conditions of work.

6. Contract.

On September 4, 1942, a Harbor Board, predecessor to the present Board, executed a collective bargaining contract with the Brotherhood of Locomotive Firemen and Enginemen, as representatives of the locomotive engineers, firemen and hostlers, employed as State employees upon the work of the Belt and with the Brotherhood of Railroad Trainmen as representatives of the yard engine foremen and helpers similarly employed.

The said Contract was executed for the predecessor Harbor Board by J. F. Marias, President of the Board and Harry See and George Schlmeyer, Commissioners, and for the Brotherhood of Locomotive Firemen and Enginemen by R. J. Brooks, Deputy President and Thomas Malim, Chairman, and for the Brotherhood of Railroad Trainmen by R. J. Brooks, Deputy President and Harry Bolen, Chairman.

When this action was instituted, the acting Chairman under the Contract were A. N. Williams, for the Brotherhood of Locomotive Firemen and Enginemen, and A. C. McFadden, for the Brotherhood of Railroad Trainmen; and the duly appointed Harbor Commissioners were Thomas Coakley, N. Loyall McLaren and William G. Welt.

The said Contract entitled a "Schedule of Rates of Pay and Working Conditions" is attached to this agreed statement. It is the Contract which was considered by the trial court.

The Contract was not approved by the State Department of Finance or the State Personnel Board. By its terms it is presently in effect.

Pursuant to the collective bargaining contract, various grievances have been taken up by the men with the superintendent and the procedure has been to take the grievances from the superintendent to the Port Manager of the Board of State Harbor Commissioners who corresponds to what would otherwise be the General Manager of the railroad. The Brotherhoods under the Contract have taken several of the cases to the National Railway Adjustment Board. Most of the men are oldtime steam railroad men who were formerly with other railroad lines and are now working for the State Belt. The operations rule book of the State Belt is practically the same as the standard railroads have.

Plaintiff in its complaint alleges that a present and actual

controversy exists between plaintiff State of California, on the one hand, and the defendant Brotherhoods on the other, in that the plaintiff State of California contends that

1. The State of California was not subject to the provisions of the Railway Labor Act;

2. The Contract was invalid and not binding upon the State of California because

(a) The Board of State Harbor Commissioners was not empowered by law to enter into the Contract;

(b) The civil service laws of the State are the exclusive definition and measure of the rights and privileges of the State civil service employees; and

(c) The Contract could not provide for provisions derogatory to the civil service laws of the State.

88 The defendant and respondent Brotherhoods contended in their Answer that

1. The State of California and its agency the Board of State Harbor Commissioners for San Francisco Harbor were subject to the Railway Labor Act;

2. The Railway Labor Act could be constitutionally applied to the State of California;

3. The provisions of the Contract supersede those provisions of the civil service law with which they conflict;

4. The Board of State Harbor Commissioners for San Francisco Harbor has the authority to bargain collectively with State employees under its supervision and has the authority to enter into the present Contract or other collective bargaining contracts.

The Questions Presented.

The questions presented by this appeal and upon this agreed statement are as follows:

1. Do the provisions of the Railway Labor Act require the State of California to enter into collective bargaining with its employees engaged upon the State Belt Railroad?

2. If the provisions do apply to the State of California, is the Railway Labor Act constitutional?

3. Is the collective bargaining contract valid?

89 4. Do the provisions of the contract which contravene the Civil Service laws and regulations of the State of California supersede those laws and regulations?

5. Are those employees who are within the provisions of a collective bargaining contract also members of the State Civil Service System?

110 And afterwards on, to wit, the 29th day of June, 1955 there was and filed in the Clerk's office of said Court a certain Memorandum of the Court in words and figures following, to wit:

111 UNITED STATES DISTRICT COURT.

Chambers of
Judge Julius J. Hoffman

June 29, 1955

Burke Williamson, Esquire
Adams Williamson & Turney, Esquires
Attorneys for Plaintiffs
39 South La Salle Street
Chicago 3, Illinois

Kenneth F. Burgess, Esquire
Douglas F. Smith, Esquire
Richard L. Selle, Esquire
Sidley, Austin, Burgess & Smith, Esquires
Attorneys for Certain Defendants
11 South La Salle Street
Chicago 3, Illinois

Edward M. White, Esquire
160 North La Salle Street
Chicago, Illinois

Edmund G. Brown; Attorney General of California
Herbert E. Wenig, Assistant Attorney General of
California

Attorneys for Intervening Defendant
600 State Building
San Francisco 2, California

Stanley N. Barnes, Assistant Attorney General
R. Ticken, United States Attorney

James E. Kilday, Special Assistant to the Attorney General
Frank J. Oberg, Special Assistant to the Attorney General
Attorneys for the United States
219 South Clark Street
Chicago 4, Illinois.

Re: Harry Taylor, et al. vs. O. E. Swan, et al.,
State of California, Intervening Defendant
No. 53 C 56

MEMORANDUM.

This case is before the court on the motions for summary judgment filed by the plaintiffs, by the United States in support of the plaintiffs and by the State of California, intervening defendant. All of the parties are agreed that there is no issue of fact outstanding and that the case is ready for decision on the legal issues raised. Affidavits and briefs have been filed in support of the several motions, and the court has heard oral argument.

An account of the events which led to this action is necessary for an understanding of the issues.

112 On September 1, 1942, the California Board of State Harbor Commissioners (Harbor Board), which operates the state-owned State Belt Railroad, entered into an agreement covering rates of pay and working conditions with two railroad unions—the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen. The five plaintiffs in this action were at all material times employees of State Belt and members of one of the two Brotherhoods.¹ Grievances arose between each of the plaintiffs and State Belt respecting either wages claimed to be due, or proper classification, or seniority rights. After unsuccessful attempts at settlement at the carrier level, the Brotherhoods on behalf of the plaintiffs filed claims with the First Division of the National Railroad Adjustment Board. These claims were duly docketed with the Board on various dates between 1949 and 1951. The Adjustment Board was created by the Railway Labor Act, 45 U. S. C. § 151 et seq., to hear and make awards in

“disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions * * *” 45 U. S. C. § 153 First (i).

The Board, and each division thereof, is composed of equal numbers of representatives of the carriers and of the labor organizations.

In the meantime, while the plaintiffs' claims were pending before the First Division of the Board, the State of California brought suit against the two Brotherhoods in

1. Under the California constitution and laws the plaintiffs as state employees, also belong to the state civil service system.

the courts of that state seeking a declaration that the state was not subject to the provisions of the Railway Labor Act and that the contract of September 1, 1942, was invalid. On July 19, 1951, the Supreme Court of California handed down a decision, *State v. Brotherhood of Railroad Trainmen*, 37 Cal. 2d 412, 232 P. 2d 857, in which it held both that the Railway Labor Act was not intended to apply to the state-owned and operated State Belt Railroad and that the collective bargaining agreement was invalid under California law. The first holding evolved from a lengthy analysis of the traditional relationship between a governmental body and its employees under which wages and working conditions have always been established by statute and administrative regulation, never by collective bargaining. The court concluded that Congress had shown no intent to engage in such an "unprecedented interference" with this tradition, 232 P. 2d at 861. In holding the contract invalid, the court said that the Harbor Board was not authorized to bind the state to any particular wage rates without the approval of the Department of Finance, as required by Section 18004 of the Government Code.

"The Department of Finance is given general powers of supervision over all matters concerning the financial and business policies of the state * * *.

The purpose of such legislation is to conserve the financial interests of the state, to prevent improvidence, and to control the expenditure of state money by any of the several departments of the state." 232 P. 2d at 863.

113 The Supreme Court of the United States denied certiorari in this case, 342 U. S. 876 (1951).

Following this decision, the five carrier members of the First Division of the Adjustment Board directed a letter on February 25, 1952, to the five labor members in which they called attention to the California court's ruling. The letter concluded:

"Therefore this Division has no jurisdiction and this is to advise you that the Carrier Members will not participate in the handling of the following State Belt Railroad of California dockets other than to dismiss them."

The claims filed by the five plaintiffs in this case were among those listed.

Faced with this administrative deadlock, the plaintiffs whose grievances were left pending and unresolved filed this suit for an injunction to compel the members and the executive secretary of the First Division of the Adjustment Board to take jurisdiction of their claims and to consider and decide them consistently with the provisions of the Railway Labor Act. The plaintiffs do not—and clearly they would have no right to—seek to require the Board or any of its members to decide the grievances in a particular way.² They ask only that the Board decide them in some way.

In their answer and briefs the defendant carrier members have argued that the plaintiffs brought the wrong action against the wrong parties. The correct action, it is said, would have been a suit for declaratory judgment against the state of California seeking a statement, or restatement, of the rights of the Brotherhoods and State Belt. The carrier members contend that in any event the Board, by the action of the carrier members, has concluded, correctly, that the questions raised by these submissions are not the kind which it was intended to resolve and that its conclusion to this effect cannot be reviewed in any manner by a court.

The State of California, which was given leave to intervene as a defendant, relies chiefly on the principles of res judicata in support of its motion for summary judgment. The California decision, it says, was conclusive on these parties as to the applicability of the Railway Labor Act and the validity of the contract, and the carrier members properly followed that decision. California has also argued that the jurisdiction of the Adjustment Board extends only to valid and existing collective bargaining contracts and that it has no jurisdiction to decide the question of validity, that an award on these claims, if ultimately made,

could not be enforced against the state because of 114 the Eleventh Amendment, and that the 1942 contract

itself provided for a system board of adjustment to supplant the federal Adjustment Board machinery within the meaning of the Railway Labor Act, 45 U. S. C. § 153 Second.

The United States, which answered on behalf of all of

2. It is not questioned that the claims themselves raise issues intended for settlement exclusively by the Adjustment Board. In this case the court is concerned only with the preliminary questions injected into the dispute by the legal effect which the carrier members accorded to the California decision.

the members and the executive secretary of the First Division of the Board, admitted all the allegations of the complaint and joined in the plaintiff's prayer for relief. The United States, in addition, moved for summary judgment contending that State Belt is subject to the Railway Labor Act, that the California court did not pass on the question of whether or not the Act supersedes technical contract requirements of state law, and that it is not necessary to determine the validity of the contract in this action, but only that the claims before the Board arose out of disputes as to the interpretation or application of a purported agreement and involved persons subject to the Act.

The principal points made by the plaintiffs are that State Belt is subject to the Railway Labor Act and that the California court had no jurisdiction to pass on this question, that *res judicata* is not applicable to these facts; and that the objectives of the Railway Labor Act cannot be nullified by California statutes establishing inconsistent civil service regulation of the wages and working conditions of State Belt employees or requiring special approval by higher state authority of an agreement concluded with the railroad unions.

At the outset, the court is required to consider whether it lacks jurisdiction to interfere in this dispute at all. The scheme of the Railway Labor Act contemplates that both the creation of the collective bargaining relationship and the settlement of disputes that may arise under it are to be accomplished without the interference of the courts. In addition, Section 3 First (1) of the Act, 45 U. S. C. § 153 First (1), provides that upon failure of the Division to agree upon an award because of deadlock or inability to secure a majority vote, a referee is to be selected in the manner set out in that subsection. Whether the selection of a referee is required only in case of an even division on the merits of an award (as the language of the Act seems to read), or whether one must be also appointed to resolve a deadlock on a preliminary jurisdictional question is not settled. In some cases the courts have entertained and decided a jurisdictional dispute³ in situations where

3. This is not to be confused with the cases involving an interunion jurisdictional conflict. The Supreme Court has not permitted the courts to interfere in these disputes before the Adjustment or Mediation Board has had an opportunity to consider them. *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239 (1950); *Order of Railway Conductors v. Pitney*, 326 U. S. 561 (1946); *General Committee v. M-K-T R. Co.*, 320 U. S. 323 (1943).

the carrier and union members disagreed, and a referee had not participated. *Order of Railway Conductors v. Swan*, 329 U. S. 520 (1947); *Brotherhood of Railroad Trainmen v. Swan*, 214 F. 2d 56 (7th Cir. 1954); cf. *Townsend v. National Railroad Adjustment Board*, 117 F. Supp. 654 (N.D. Ill. 1954). Only the Court of Appeals for the Seventh Circuit has specifically held that the referee sits only to make an award and that this presupposes that all jurisdictional requisites have been met. *Illinois Central R. Co. v. Whitehouse*, 212 F. 2d 22 (7th Cir. 1954), rev'd, U. S. (June 6, 1955). In that case the Court 115 of Appeals affirmed an order of the district court enjoining the Adjustment Board from proceeding to hear the merits of a claim until it gave formal notice, which the court held to be jurisdictional, to an interested union which was not a party to the submission. A referee had been appointed to participate on the merits of the dispute, but he did not vote on the question of giving notice. This was found to be in accordance with the Act which authorizes the referee to sit only in case of deadlock on the making of an award. In reversing, the Supreme Court confined its decision to the narrow holding that the plaintiff railroad's injuries were in the circumstances of that case too speculative to warrant resort to the extraordinary remedy of mandamus, thus leaving unanswered the question of the power of a referee to participate in this sort of preliminary determination as well as some of the broader questions as to the circumstances, admittedly limited, under which a court might resolve legal issues raised before the Board. It also appears from the opinion that the Court probably eliminated the force of the *Whitehouse* case as precedent here by implicitly holding that notice was not in any event jurisdictional in the sense that the Board had no authority to proceed without giving it.

Unlike the *Whitehouse* case where the Board, with the aid of the referee, was willing to reach a decision on the merits of the claims presented, this Board cannot. The carrier members firmly refuse to participate in the submissions other than to dismiss them, and the court interprets this to mean that they would also decline to participate in selecting a referee. The integrity of the Board's exclusive, or primary, jurisdiction surely does not authorize one-half of the Board to take actions delegated by the Act to the entire Board. In addition, the Supreme Court

has in other circumstances said that where the dispute is as to the validity of a contract,⁴ not its meaning, the courts, rather than the Mediation or Adjustment Board, are the appropriate tribunal. *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768, 774 (1952); cf. *Switchmen's Union of North America v. Ogden Union Railway & Depot Co.*, 209 F. 2d 419, 421 (10th Cir. 1954), cert. denied, 347 U. S. 989 (1954). Thus, the plaintiffs were confronted with a true administrative deadlock on a jurisdictional issue which this court may pass upon, and they properly brought the dispute to court. *Order of Railway Conductors v. Swan*, 329 U. S. 520 (1947) (evenly divided vote within each of two Divisions of the Board as to which Division had jurisdiction over the disputes of a certain group of employees); *Brotherhood of Railroad Trainmen v. Swan*, 214 F. 2d 56 (7th Cir. 1954); *Air Line Dispatchers Association v. National Mediation Board*, 189 F. 2d 685 (D. C. Cir. 1951), cert. denied, 342 U. S. 849 (1951); *Delaware & Hudson R. Corp. v. Williams*, 129 F. 2d 11 (7th Cir. 1942), judgment vacated, 317 U. S. 600 (1942).

116 Having decided, however, that the plaintiffs correctly sought judicial intervention, the court must disagree with them on the merits. The several parties to this action have raised many difficult issues, any one of which could dispose of the case in one way or another. But the court has determined that it must give conclusive effect to that part of the California decision which held the collective bargaining contract invalid as a matter of state law.

It should be noted that this does not constitute acceptance or approval of the California court's holding that State Belt is not subject to the Railway Labor Act. The soundness of this conclusion is doubtful. The Court of

4. Actually the Board was faced with three questions, all of which go to its authority to hear these particular claims: (1) the applicability of the Railway Labor Act to State Belt; (2) the validity of the contract on which the claims were based; and (3) the legal effect of the California decision on both of these issues. If the only question had been whether State Belt was subject to the Act, this court might well have left the initial decision to the Board. To a great extent this jurisdictional ruling is inherent in every Board decision. But the carrier members were right in concluding that the first question was the effect of the California decision. Viewed in this way, it seems particularly unlikely that exclusive jurisdiction to pass on this point would be lodged in the Board. The Board is not the typical quasi-judicial administrative agency. Its members are actually representatives of the two parties to most disputes before the Board, and their particular contribution is that they "understand railroad problems and speak the railroad jargon." *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239, 243 (1950).

Appeals for the Fifth Circuit has held that the New Orleans Public Belt Railroad, similarly a state-owned carrier engaged in interstate commerce, subject to the Act, expressly disapproving the California decision, *New Orleans Public Belt R. Commission v. Ward*, 195 F. 2d 829 (5th Cir. 1952). Moreover, State Belt has been held subject to other federal regulatory acts. *United States v. California*, 297 U. S. 175 (1936) (Safety Appliance Act); *California v. Anglin*, 129 F. 2d 455 (9th Cir. 1942), cert. denied, 317 U. S. 669 (1942) (Carriers' Taxing Act); *Maurice v. California*, 43 Cal. App. 2d 270, 110 P. 2d 706 (1941) (Federal Employers' Liability Act). On the other hand, the state of California has made a persuasive argument that this situation must be distinguished because the states traditionally have exercised exclusive domain over the terms and conditions of employment of their own workers and the Railway Labor Act was not intended to require California to abandon its civil service system. It is not necessary to resolve this conflict, nor is the court called upon to decide whether the California holding of inapplicability of the Act, right or wrong, is res judicata as to these parties. Compare *Angel v. Bullington*, 330 U. S. 183 (1947). Ordinarily, of course, federal courts have the final responsibility for interpreting acts of Congress as well as the federal Constitution.

By the same token, however, California has the final right to determine whether or not the Harbor Board has exceeded its powers under state law by entering into this agreement. The parties have devoted considerable argument to the applicability or non-applicability of res judicata to this part of the California decision. While the question is not free from doubt, it would seem that the Brotherhoods, which are the real parties in interest to the submissions, and the state of California (State Belt), the defending party before the Board, should be precluded from relitigating the question. Restatement, Judgments § 70, 77 (1942); Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 7 ff., 11-12, 15. (1942). Whether or not res judicata bars relitigation of the validity of the contract, the decision of the California court that this contract was invalid as a matter of state law cannot be re-examined or nullified by this court. The California Supreme Court is the final arbiter of the meaning of the state's statutes and of the validity of contracts entered

into by the state, and the federal courts are bound by its construction: *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 461-62 (1947); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana*, 332 U. S. 495, 499 (1947); *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 86-87 (1947); *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 633-34 (1941).

117 Only an overriding federal policy to which the state must give way would justify us in ignoring the declared invalidity of this agreement. The plaintiffs have contended that the California legislature has no right to enact regulations governing the contractual powers of a carrier subject to the Railway Labor Act and that to permit California to nullify this agreement is to sacrifice the broad objectives of the Act to a technical vindication of state policy wholly unrelated to the promotion of peace and stability in interstate railway transportation. Assuming for the moment that this contract enjoyed the initial protection of the Railway Labor Act, it does not follow that the invalidation of it inevitably runs afoul of that Act. This case seems hard because the contract was not upset until some eight years after it was signed, and the lapse of time might be expected to produce confusion as to the rights of all who were parties to the agreement. On the other hand, it has now been several years since the contract was invalidated, and we are not informed of any serious disruption in the relationship between the two Brotherhoods and State Belt. Unquestionably they have found something—whether a new and valid contract or a more formal arrangement—to take the place of the invalid contract. It may well be that a state which owned a carrier subject to the Act could not create obstacles so difficult to overcome that for all practical purposes the employees were denied the machinery of the Act.⁵ California has not done that. It has declared only that this particular contract is invalid because Harbor Board had no authority to conclude it without the approval of the Department of Finance. It does not appear, as the plaintiffs contend, that this was merely a technical objection. The opinion of the California Supreme Court indicates that the Department of Finance

5. A more difficult question would be presented if the California court had held that state civil service regulations, some of which conflicted with provisions of the contract, could never be superseded by terms arrived at by collective bargaining between the employees of State Belt and the Harbor Board.

is the financial watchdog of state government and that its responsibility to all the people of the state was to supervise and harmonize the expenditure of funds by the various departments. This would seem to require that it have prior knowledge of substantial wage commitments. Nor does the requirement of Department of Finance approval of this agreement violate the established concept of good faith bargaining written into the Railway Labor Act. Compare *Great Southern Trucking Co. v. National Labor Relations Board*, 127 F. 2d 180 (4th Cir. 1942), cert. denied, 317 U. S. 652 (1942).

Since the court has concluded that the plaintiffs' claims did not arise out of a valid, existing contract, the carrier members were correct in saying that the Adjustment Board had no jurisdiction and the submissions should be dismissed. This is a fair conclusion from the language of the Supreme Court in *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768, 774 (1952) and *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239 (1950). Conceivably the language of Section 3 First (i), "disputes * * * growing out of grievances or out of the interpretation or application of agreements", is broad enough to permit the submission of claims under some circumstances when an existing agreement is lacking. Even so, the only claims involved in this class are based exclusively on the 1942 contract. Whatever grievance may still exist, it is not the one incorporated in the documents submitted to the Board.

118 The motion of the State of California for summary judgment in favor of the defendants is granted. The motions of the plaintiffs and of the United States for summary judgment are denied.

Counsel for the State of California will prepare formal judgment order and present same for the signature of the court on or before July 8, 1955.

Julius J. Hoffman,
Judge.

119 And afterwards on, to wit, the 8th day of July, 1955, came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Motion to Modify Court's Memorandum of Decision, dated June 29, 1955, in words and figures following, to wit:

120 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—53-C-56) * *

**PLAINTIFFS' MOTION TO MODIFY COURT'S
MEMORANDUM OF DECISION, DATED JUNE 29,
1955.**

Now come Harry Taylor, Peter A. Calus, James W. Brewster, William J. Langston, and H. C. Greer, plaintiffs herein, by Burke Williamson and Adams Williamson & Turney, their attorneys, and move the Court to modify its Memorandum of decision, dated June 29, 1955, and which directed the preparation of a formal judgment order granting the motion of the State of California for summary judgment in favor of the defendants, as follows:

1. The Court's Memorandum declares that the collective bargaining agreement of 1942 is invalid for the reason that it was not approved by the Department of Finance of the State of California. To quote from pages 9-10 of the Memorandum:

5 * * * It may well be that a state which owned a carrier subject to the Act could not create obstacles so difficult to overcome that for all practical purposes the employees were denied the machinery of the Act.⁵ California has not done that. It has declared only that this particular
121 contract is invalid because Harbor Board had no authority to conclude it without the approval of the Department of Finance. It does not appear, as the plaintiffs contend, that this was merely a technical objection. The opinion of the California Supreme Court indicates that the Department of Finance is the financial watchdog of state government and that its responsibility to all the people of the state was to supervise and harmonize the expenditure of funds by the various departments. This would seem to require that it have prior knowledge of substantial wage commitments. Nor does the requirement of Department of

Finance approval of this agreement violate the established concept of good faith bargaining written into the Railway Labor Act. Compare *Great Southern Trucking Co. v. National Labor Relations Board*, 127 F. 2d 180 (4th Cir. 1942), cert. denied, 317 U. S. 652 (1942).

5. A more difficult question would be presented if the California court had held that state civil service regulations, some of which conflicted with provisions of the contract, could never be superseded by terms arrived at by collective bargaining between the employees of State Belt and the Harbor Board."

2. In its decision declaring the collective bargaining agreement invalid (*State of California v. Brotherhood of Railroad Trainmen*, 37 Cal. 2d 412, 323 P. 2d 857), the Court said:

"The judgment in the present case must be reversed for the further reason that assuming the state is subject to the Railway Labor Act and that state civil service regulations are superseded by provisions of that act, the Harbor Board could not properly enter into the contract with the brotherhoods and bind the state without the approval of the Department of Finance, as required by section 18004 of the Government Code."

4. Section 18004 provides: "Unless the Legislature specifically provides that approval of the Department of Finance is not required; whenever any State agency or court fixes the salary or compensation of an employee or officer, which salary is payable in whole or in part out of State funds, the salary is subject to the approval of the Department of Finance before it becomes effective and payable." (As added in 1945, based on former Pol. Code, § 6751.)"

It will be observed that the approval of the Department of Finance is required *only* as to the salary of an employee.

3. The collective bargaining agreement is part of the record before this Court inasmuch as it is included in material filed by the State of California known as the Agreed Statement of Facts on appeal in the case entitled *State of California v. Brotherhood of Railroad Trainmen*, filed herein pursuant to order entered February 4, 1955. This agreement includes 28 separate Articles. Article 1, Rates of Pay, is the only Article which deals with salary or wages.

4. The submissions filed with the First Division of the National Railroad Adjustment Board by the five plaintiffs and which are the subject of the present suit are described in paragraphs 8 to 17, inclusive, of the Complaint herein. The submissions themselves have been made a part of the record before the Court by Stipulation heretofore filed

herein. Examination of these submissions discloses that they involve principally the following Articles of the collective bargaining agreement:

| Name | Article No. |
|-----------------------|--|
| Harry Taylor | 14 (Seniority); and 24 (Approval of Application). |
| Peter A. Calus | 2 (Basic Day). |
| 123 James W. Brewster | 24 (Approval of Application). |
| William J. Langston | 11 (Extra Service); 2 (Basic Day); and 3 (Overtime). |
| H. C. Greer | 2 (Basic Day); 9 (Designated Point— Beginning and End of Day); and 14 (Seniority). |

5. The ground of invalidity of the collective bargaining agreement assigned by the Supreme Court of the State of California is applicable only to Article 1 of the agreement and its invalidity does not affect the other Articles of the agreement or the plaintiffs' submissions based on such other Articles.

6. The plaintiffs do not agree that any part of the collective bargaining agreement is invalid, but assuming that the Court's conclusion in this respect is to stand, they respectfully suggest that the Court's Memorandum should be modified so as to uphold the validity of Articles 2 to 28, inclusive, of the collective bargaining agreement, to sustain the plaintiffs' submissions based on such Articles 2 to 28, inclusive, and to deny the motion for summary judgment of the State of California.

Wherefore, the plaintiffs respectfully request the Court to modify its Memorandum of decision, dated June 29, 1955.
July 7, 1955.

Burke Williamson,
Adams Williamson & Turney,
39 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Plaintiffs.

124 And afterwards on, to wit, the 12th day of July, 1955, there was filed in the Clerk's office of said Court a certain Supplemental Memorandum of the Court, in words and figures following, to wit:

125

UNITED STATES DISTRICT COURT

Chicago.

Chambers of

Judge Julius J. Hoffman

July 12, 1955.

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 Attorneys for the United States

219 South Clark Street
 Chicago 4, Illinois

Re: Harry Taylor, et al. vs. O. E. Swan, et al.,
 State of California, Intervening Defendant
 No. 53 C 56

SUPPLEMENTAL MEMORANDUM.

The plaintiffs have moved the court for an order modifying its memorandum filed on June 29, 1955. In effect, they seek a reversal of the court's decision directing that summary judgment be entered in favor of the defendants and against the plaintiffs.

The plaintiffs interpret the court's decision to be that the collective bargaining agreement of 1942 is invalid because it was not approved by the Department of Finance of California, a requirement which California was entitled to impose without offending the Railway Labor Act. This raises, it is contended, a new legal issue not previously

considered by the parties or the court—viz., the severability of the wage provisions of the contract. The

argument is that Department of Finance approval is required only as to salary matters; that only Article 1 of the bargaining agreement relates to wages; and that all of the claims filed by these plaintiffs were based on provisions of the agreement other than Article 1. Thus, the plaintiffs say that this court may determine "under general principles of law" whether the entire contract was invalid or only the article dealing with wages; and if only the wage provisions were invalid, the Adjustment Board can be ordered to hear the plaintiffs' claims.

As noted above, the plaintiffs assume that the "basic premise" of the court's decision was that California could lawfully require Department of Finance approval of this contract and that failure of such approval invalidated the contract. This assumption is not correct. The court held the contract invalid only because it had been so declared by the highest court of California as a matter of state law. It was the California court, not this one, which reached that conclusion, and we merely gave to its decision the effect which was required as a matter of law. The further discussion of the reasonableness of the California court's grounds for invalidating the contract was thought necessary because of a contention which the plaintiffs made in their original briefs. The plaintiffs had argued that this court must decide whether State Belt was subject to the Railway Labor Act because, if it was, the supremacy of that Act precluded the California court from invalidating the contract. It was this court's view that, assuming applicability of the Act, the California Supreme Court's ac-

tion was not such an interference with the purposes of the Railway Labor Act that it must be upset. Except for the necessity of meeting this contention, the court would not have felt it proper to inquire into the basis of the California court's holding at all. The principle underlying the decision in this case was that we had no such power. We would be just as guilty of assuming the prerogatives of the California court if we were *now* to read into its decision a qualification that does not in any way appear there. It must be remembered that the California court was dealing with the statutory powers of a state agency, not with an analysis of the separate provisions of a collective bargaining agreement under the general principles of contract law. Its holding was that Harbor Board had no authority to bind the state of California to the contract; and from all that appears in the opinion this lack of authority made it powerless to sign the agreement at all.

The defendant carrier members have pointed out that any awards that might be entered on the plaintiffs' claims would require an application of the wage rates set out in the agreement—concededly invalid—to various other provisions of the contract. With the possible exception of the plaintiff Taylor's claim, this seems to be true and is an additional reason for denying the plaintiffs' present motion.

An order has been signed this day entering judgment in favor of the defendants in accordance with the court's memorandum of June 29, 1955.

Julius J. Hoffman,

Judge.

127 And on the same day, to wit, on the 12th day of July, 1955, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Julius J. Hoffman, District Judge, appears the following entry, to wit:

128 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—53-C-56).

JUDGMENT ORDER.

This cause coming on to be heard on the motion of plaintiffs for summary judgment, the motion of the United States for summary judgment in behalf of plaintiffs, and the motion of the State of California, intervening defendant, for summary judgment for defendants, and the court having heard the argument of counsel and being fully advised in the premises,

The Court Finds that the motion of the State of California for summary judgment for defendants should be allowed and the motions for summary judgment by plaintiff and the United States on behalf of plaintiffs should be denied in accordance with the memorandum opinion heretofore filed herein.

It Is, Therefore, Ordered that judgment be and it hereby is entered in favor of defendants and plaintiffs' complaint is accordingly dismissed, with costs against the plaintiffs.

Enter:

Julius J. Hoffman,
Judge.

Dated: July 12, 1955.

129 And afterwards on, to wit, the 11th day of August, 1955 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Notice of Appeal (Clerk's Certificate of Mailing Attached Thereto) and Bond on Appeal in words and figures following, to wit:

130 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

Eastern Division.

Harry Taylor, Peter A. Calus,
James W. Brewster, William J.
Langston, and H. C. Greer,
Plaintiffs.

vs.

O. E. Swan, H. W. Burtness,
George H. Dugan, T. L. Green,
H. J. Reeser, John P. Brindley,
B. C. Johnson, C. W. Kealey,
B. W. Fern, and Don A. Miller,
individually and as members of
the First Division of the Na-
tional Railroad Adjustment
Board, and John M. MacLeod,
as Executive Secretary of the
First Division of the National
Railroad Adjustment Board,
Defendants.

Civil Action
No. 53-C-56.

State of California,

Intervening Defendant.

NOTICE OF APPEAL.

Notice is hereby given that Harry Taylor, Peter A. Calus, James W. Brewster, William J. Langston, and H. C. Greer, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final Judgment Order in favor of the 131 defendants and dismissing the plaintiffs' complaint, with costs against the plaintiffs, entered in this action on July 12, 1955.

Burke Williamson,
Adams Williamson & Turney,
*Attorneys for Appellants, Harry
Taylor, Peter A. Calus, James
W. Brewster, William J.
Langston, and H. C. Greer,*
39 South LaSalle Street,
Chicago 3, Illinois.

Dated: August 11, 1955.

138 And afterwards on, to wit, the 22nd day of August, 1955 came the Plaintiffs-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Designation of Contents of Record on Appeal, and Statement of Points in words and figures following, to wit:

145 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—53-C-56)

STATEMENT OF POINTS.

The plaintiffs-appellants, Harry Taylor, Peter A. Calus, James W. Brewster, William J. Langston, and H. C. Greer, are not designating for inclusion the complete record and all the proceedings and evidence in the action for their appeal to the United States Court of Appeals for the Seventh Circuit. Therefore, pursuant to Rule 75(d) of the Rules of Civil Procedure for the United States District Courts, they serve and file with their designation a concise statement of the points on which they intend to rely on their appeal, as follows:

1. The Complaint states a claim upon which relief can be granted.

2. The rule that the United States cannot be sued without its consent is inapplicable to this case.

146 3. This is a proper case for equitable relief against the National Railroad Adjustment Board.

4. This case presents a federal question.

5. This suit does not seek to control the exercise of discretion by the National Railroad Adjustment Board.

6. The question of authority of the National Railroad Adjustment Board to decide disputes concerning the validity of collective bargaining agreements need not be decided; nevertheless, the Adjustment Board has such authority.

7. The judgment of the Supreme Court of the State of California is not res judicata with respect to the application of the Railway Labor Act to the State of California as the owner and operator of the State Belt Railroad.

8. The California State Courts have no jurisdiction to decide whether the operation of the State Belt Railroad is subject to the Railway Labor Act.

9. The operation of the State Belt Railroad is subject to the Railway Labor Act.

10. The establishment of wages, rules, and working conditions through collective bargaining, as required by the Railway Labor Act, is not subject to the authority of the State to nullify through legislation regulating terms and conditions of employment.

11. The Eleventh Amendment of the United States Constitution would not bar enforcement of a money award made by the National Railroad Adjustment Board.

12. The collective bargaining agreement of September 1, 1942 does not establish a system board of adjustment within the contemplation of Section 3, Second, of the Railway Labor Act.

13. The doctrine of exhaustion of administrative remedies has no application to the facts of the present case.

14. The Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen are not indispensable parties.

15. The Railway Labor Act is applicable to the State of California as a carrier.

16. The applicability of the Railway Labor Act to the State of California in its operation of the State Belt Railroad is not an unconstitutional interference with the State's rights as a sovereign to control its relationship with its employees.

17. The collective bargaining agreement of September 1, 1942 is not invalid for reasons additional to the ground of invalidity given by the California Supreme Court, or for the reason given.

18. The doctrine of res judicata does not bar litigation of the validity of the collective bargaining agreement of September 1, 1942.

19. The Federal courts are not bound by the construction of the California Courts as to the validity of the collective bargaining agreement entered into by the State of California.

20. The laws of the State of California have created such obstacles to the collective bargaining required by the Railway Labor Act as to deny to the plaintiffs the benefit of the Railway Labor Act.

21. Assuming that the portion of the collective bargaining agreement having to do with rates of pay was invalid under the laws of the State of California, the remainder of the collective bargaining agreement should have been upheld by the Federal court, the submissions based on such remainder and made by the plaintiffs to the National Railroad Adjustment Board should have been passed on by that Board, and the Federal court should have so directed.

22. The Memorandum of opinion, dated June 29, 1955, and the Supplemental Memorandum of opinion, dated July 12, 1955, are contrary to the record before the Court and to the law applicable to the case.

23. The Judgment Order of July 12, 1955 in favor of the defendants is contrary to the record before the Court and to the law applicable to the case.

Dated: August 19, 1955.

Burke Williamson,
Adams Williamson & Turney,
Attorneys for plaintiffs-appel-
lants, Harry Taylor, Peter A.
Calus; James W. Brewster,
William J. Langston, and
H. C. Greer,

Address: 39 South LaSalle Street,
Chicago 3, Illinois.

Proof of Service of Designation of Contents of Record on
Appeal and of Statement of Points.

District of the United States, }
State of Illinois, } ss.
County of Cook.

Dorothy M. Venables, being first duly sworn, deposes and says that she served the foregoing Designation of Contents of Record on Appeal and Statement of Points on the attorneys listed below by depositing in the United States mail chute in the building bearing the address of 39 South LaSalle Street, Chicago, Illinois, true and correct copies thereof in envelopes duly addressed to said attorneys at their addresses as shown below, with 150 postage paid, on the 19th day of August, 1955, said attorneys and addresses being as follows:

Robert Tieken,
United States District Attorney at Chicago,

James E. Kilday and

Frank J. Oberg,

Special Assistants to the
Attorney General of the United States,
United States Court House,
219 South Clark Street,
Chicago 4, Illinois.

Kenneth F. Burgess,

Douglas F. Smith,

Richard L. Selle,

11 South LaSalle Street,
Chicago 3, Illinois.

Edward M. White,

Edmund G. Brown,

Attorney General of California,

Herbert E. Wenig,

Assistant Attorney General of California,

160 North LaSalle Street, Rm. 900,

Chicago 1, Illinois.

Dorothy M. Venables.

Subscribed and sworn to before me this 19th day of
August, 1955.

(Seal)

Marie A. Madura,
Notary Public.

151 And afterwards, to wit, on the 9th day of September, 1955, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. La Buy, District Judge, appears the following entry, to wit:

152 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—53-C-56) * *

**ORDER SUBSTITUTING PARTIES, AUTHORIZING
USE OF ORIGINAL PAPERS OR EXHIBITS IN
LIEU OF COPIES, AND GRANTING LEAVE TO
FILE STATEMENT OF ADDITIONAL POINT.**

This cause coming on to be heard on the motions of the plaintiffs herein for the entry of an order as hereinafter set forth, and it appearing that notice of motion for the entry of such order has been given to the individuals or attorneys concerned, and the Court being advised in the premises:

It Is Hereby Ordered that:

1. The following defendants who are no longer members of the National Railroad Adjustment Board, First Division, are hereby dropped as defendants and their successors as such members are hereby substituted as follows:

J. K. Hinks in lieu of B. C. Johnson;
C. E. McDaniels in lieu of John P. Brindley;
H. V. Bordwell in lieu of T. L. Green; and
L. B. Fee in lieu of O. B. Swan.

153 2. All pleadings and documents heretofore filed on behalf of, and orders heretofore entered pertaining to, B. C. Johnson, John P. Brindley, T. L. Green, and O. B. Swan shall be deemed to have been filed on behalf of, or to have been entered as pertaining to, J. K. Hinks, C. E. McDaniels, H. V. Bordwell, and L. B. Fee, respectively.

3. The Clerk of this Court is hereby directed to include in the Record on Appeal which he is now preparing for the plaintiffs' appeal to the United States Court of Appeals for the Seventh Circuit from the final Judgment Order of July 12, 1955 the following original papers or exhibits in lieu of copies:

a. Each and every document referred to in the Stipulation filed April 29, 1954 (see Item 14 of Designation of Contents of Record on Appeal);

b. Agreed Statements on Appeal by Appellant, Respondents and Intervenor in lieu of Clerk's and Reporter's Transcript in case S F 18003, State of California vs. Brotherhood of Railroad Trainmen, et al. and David T. Lock, Intervenor, as attached to Supplemental Affidavit in Support of Intervenor's Motion for Summary Judgment Filed With Leave of Court made by Edward M. White, filed February 7, 1955 (see Item 22 of Designation of Contents of Record on Appeal).

154 4. The plaintiffs-appellants are hereby granted leave to file instant their Statement of Additional Point, copy of which has heretofore been served on the parties herein, and such parties, as appellees in the appeal now pending to the United States Court of Appeals for the Seventh Circuit, are hereby granted leave to serve and file additional portions of the record to be included in the Record on Appeal on or before September 19, 1955.

Enter:

Walter J. La Buy,
Judge.

September 9, 1955.

155 And on the same day, to wit, the 9th day of September, 1955 came the Plaintiffs-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Statement of Additional Point in words and figures following, to wit:

156 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—53-C-56) * *

STATEMENT OF ADDITIONAL POINT.

The plaintiffs-appellants, Harry Taylor, Peter A. Calus, James W. Brewster, William J. Langston, and H. C. Greer, are not designating for inclusion the complete record and all the proceedings and evidence in the action for their appeal to the United States Court of Appeals for the Seventh Circuit. Therefore, pursuant to Rule 75 (d) of the Rules of Civil Procedure for the United States District

Courts, and pursuant to leave of court granted on September 9, 1955, they serve and file with their designation a statement of an additional point on which they intend to rely on their appeal, as follows:

1. Notwithstanding the decision by the Supreme Court of California holding that the collective bargaining agreement of September 1, 1942 is invalid under California law, the agreement is nevertheless sufficient to provide a basis for the claims submitted by the plaintiffs to the National Railroad Adjustment Board, First Division.

157 Dated: September 9, 1955.

Burke Williamson,
Adams Williamson & Turney,
*Attorneys for Plaintiffs-
Appellants,*
39 South La Salle Street,
Chicago 3, Illinois.

158 And on the same day, to wit, the 9th day of September, 1955 there was filed in the Clerk's office of said Court a certain Information Required by Rule 17(e) of the Rules of the United States District Court for the Northern District of Illinois in words and figures following, to wit:

159 IN THE DISTRICT COURT OF THE UNITED STATES,

(Caption—53-C-56)

**INFORMATION REQUIRED BY RULE 17 (a) OF THE
RULES OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.**

Parties to the Judgment and the Names and Addresses of Their Respective Attorneys of Record, After Giving Effect to Order Entered September 9, 1955 Substituting Certain Members of the National Railroad Adjustment Board, First Division, as Parties Defendant.

Parties to the Judgment and Names & Addresses of Their Attorneys:

Harry Taylor, Peter A. Calus, James W. Brewster, William J. Langston, and H. C. Greer, Plaintiffs-Appellants, Burke Williamson, Adams Williamson & Turney, 39 South La Salle Street, Chicago 3, Illinois.

160 L. B. Fee, H. W. Burtness, George H. Dugan, H. V. Bordwell, H. J. Reeser, C. E. McDaniels, J. K. Hinks, C. W. Kealey, B. W. Fern, and Don A. Miller, individually and as members of the First Division of the National Railroad Adjustment Board, First Division of the National Railroad Adjustment Board, John M. MacLeod, as Executive Secretary of the First Division of the National Railroad Adjustment Board, and The United States of America, Defendants-Appellees, Robert Tieken, United States District Attorney at Chicago, James E. Kilday and Frank J. Oberg, Special Assistants to the Attorney General of the United States, United States Court House, 219 South Clark Street, Chicago 4, Illinois.

L. B. Fee, H. W. Burtness, George H. Dugan, H. V. Bordwell, and H. J. Reeser, individually and as members of the First Division of the National Railroad Adjustment Board, Defendants-Appellees, Kenneth F. Burgess, Douglas F. Smith, Richard L. Selle, 11 South La Salle Street, Chicago 3, Illinois.

State of California, Intervening Defendant-Appellee, Edward M. White, Edmund G. Brown, Attorney General of California, Herbert E. Wenig, Assistant Attorney General of California, 160 North La Salle Street, Room 900, Chicago 1, Illinois.

Submitted by:

Burke Williamson.

161 United States of America, }
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: Harry Taylor; et al., Plaintiffs, vs. L. B. Fee, et al., Defendants, No. 53 C 56, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except certain original papers and exhibits as designated and incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 19th day of September, 1955.

Roy H. Johnson,

(Seal)

Clerk,

By Gizella Butcher,

Deputy Clerk.

[fol. 84] IN THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT, OCTOBER TERM, 1955—APRIL SESSION,
1956

No. 11573

HARRY TAYLOR, PETER CALUS, JAMES W. BREWSTER, WILLIAM
J. LANGSTON and H. C. GREER, Plaintiffs-Appellants,

v.

L. B. FEE, et al., Defendants-Appellees, and STATE OF
CALIFORNIA, Intervening Defendant-Appellee

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

Before Finnegan, Lindley and Schnackenberg, Circuit
Judges.

OPINION—April 23, 1956

SCHNACKENBERG, Circuit Judge:

This suit was brought in the district court to compel the First Division of the National Railroad Adjustment Board to take jurisdiction of and decide five claims filed there by plaintiffs.

Among the facts found by the district court¹ are those which we now state.

On September 1, 1942, the California Board of State Harbor Commissioners,² which operates the state-owned State Belt Railroad, entered into an agreement covering rates of pay and working conditions with two railroad unions—the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen. The five plaintiffs in this action were at all material times employees of State Belt and members of one or the other of the two brotherhoods.

At various times during the period beginning September 1, 1942 and the filing of this suit on January 14, 1953, the

¹ 132 F. Supp. 356.

² Herein sometimes referred to as the "Harbor Board".

plaintiffs were employed as trainmen, engineer and pilot for the State Belt Railroad. Between April 6, 1949 and August 13, 1951, grievances on behalf of plaintiffs were filed with the First Division of the National Railroad Adjustment Board, which never acted upon them. The Adjustment Board was created by the Railway Labor Act, 45 U. S. C. A. § 151 *et seq.*, to hear and make awards in disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. The Board, and each division thereof, is composed of equal numbers of representatives of the carriers and of the labor organizations.

Following a decision by the California Supreme Court (*State v. Brotherhood of Railroad Trainmen*, 37 Cal. 2d 412, 232 P. 2d 857),⁴ the five carrier members of the First Division of the Adjustment Board declined to proceed, claiming that the Division was without jurisdiction due to the California court's ruling. Faced with an administrative deadlock in the Division, the plaintiffs filed this suit.

The attorney general of the United States filed an answer on behalf of the First Division, in which the allegations of plaintiffs' complaint were admitted and the plaintiffs' right to the relief prayed for was also acknowledged. The five carrier members of the First Division appeared by special counsel and resisted plaintiffs' claim to the relief sought. The state of California was permitted to intervene as a defendant.

The district court granted a motion of the state for summary judgment and entered a final judgment order dismissing the plaintiff's complaint as to all defendants, from which this appeal was taken. The errors relied on arise out of conclusions of law made by the court. There is no contested issue of fact.

[fol. 86] The State Belt Railroad is a common carrier engaged in interstate commerce. Its lines parallel the

³ 45 U. S. C. A., § 153 First (i).

⁴ For brevity sometimes referred to herein as "*State v. Brotherhoods*".

waterfront of San Francisco Harbor and serve some 45 wharves and 175 industrial plants. It has track or freight-car ferry connections with three interstate railroads. The State Belt Railroad is a vital link connecting various steamship terminals and adjacent industrial plants with three interstate carriers by railroad. The number of its employees varies between 125 and 225 persons, depending upon the volume of its business. *State v. Brotherhoods, supra*. In this court these facts are not disputed.

The Harbor Board operated the Railroad and applied the provisions of the collective agreement from September 1, 1942, to about November 13, 1951. The plaintiffs and the other enginemen and trainmen employees rendered services to the Harbor Board and received their pay under the September 1, 1942 agreement. During the period referred to, claims were filed by or on behalf of various employees with the National Railroad Adjustment Board, and awards were rendered on these claims.

Early in 1948 the state of California filed an action for declaratory judgment against the two brotherhoods in the Superior Court of the City and County of San Francisco. This action sought to have the September 1, 1942 agreement declared illegal, and was predicated upon two contentions: *first*, that, because the Railway Labor act does not expressly apply to state-owned railroads, the operation of the State Belt Railroad is not subject to that act and the Harbor Board is not obliged to bargain collectively with the representatives of its employees for the purpose of establishing employees' rates of pay, rules and working conditions, and *secondly*, that the collective agreement of September 1, 1942 does not conform to the requirements of California statutory laws, because the rates of pay, which comprise article 1 of the agreement, were not submitted to the Department of Finance for its approval.

Section 1 of the statute upon which the state relies, as it existed when this contract was signed, being the act of September 15, 1935, § 675.1 of Political Code of California, reads as follows:

"Unless the Legislature specifically provides otherwise, whenever any State department board, commission, court or officer fixes the salary or compensation

of one employee or officer; which salary is payable out [fol. 87] of State funds, the salary shall be subject to the approval of the State Department of Finance before it becomes effective and payable."

In 1943 (California Laws 1943, ch. 1016, § 1) slight changes in phraseology were made. They are not material here. In its present form § 675.1 is known as § 18004, Gov. Code of California.

The Superior Court entered judgment in favor of the defendant brotherhoods. This judgment was affirmed on appeal by the District Court of Appeals, First District, but the judgment was reversed by the California Supreme Court on June 20, 1951, 37 Cal. 2d 412; 232 P. 2d 857. Certiorari was denied by the United States Supreme Court. 342 U. S. 876.

1. The state of California takes the position that the decision of its highest court in *State v. Brotherhoods*, *supra*, determining that the Railway Labor act is not applicable to the state, and that the contract of September 1, 1942 is invalid, is *res judicata* in this case, and that the district court was correct in so holding.

It is significant that plaintiffs in this case were not parties to *State v. Brotherhoods*. But, says the state of California, plaintiffs in this action "are in privity with the Brotherhoods who represented them before the California court and now represent them before the Adjustment Board." The state does not define the capacity in which it claims the brotherhoods represented plaintiffs. Certainly the record is devoid of any evidence of an express grant of authority. If the brotherhoods had an agency to represent the plaintiffs in that case, as far as the record before us shows, it could have been derived only from (a) the provisions of the federal Railway Labor act, or (b) the bargaining agreement of September 1, 1942, or both.

(a) The railway Labor act,⁵ in § 151, defines the term "employee" as used therein, as including "every person in the service of a carrier . . . who performs any work . . ." The same section also defines the term "representative" as meaning "any person or persons, labor union,

⁵ 45 U. S. C. A., § 151, *et seq.*

organization, * * * designated either by a carrier * * * or by its or their employees, to act for it or them."

Section 152, after placing a duty upon all carriers and employees to exert every reasonable effort to make agree- [fol. 88] ments concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, provides that all disputes between a carrier and its employees shall be considered, and, if possible, decided in conference between representatives designated and authorized so to confer, respectively, by the carrier and the employees thereof interested in the dispute. It further provides that representatives, "*for the purposes of this chapter*, shall be designated by the respective parties * * *." It also stipulates that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and that in case of a dispute arising out of grievances, the designated representatives of the carrier and such employees, shall confer in respect to such dispute.

Section 153(i) provides that disputes growing out of grievances may be referred *by either party* to the appropriate division of the Adjustment Board. Section 153(j) states that the parties may be heard either *in person*, by counsel, or by other representatives, as they may respectively elect.

(b) We have examined the excerpts from the agreement of September 1, 1942 appearing in the record, and we find no authorization therein empowering the brotherhoods to represent the individual members in any court whatsoever, and counsel has not directed our attention to any part of the contract granting such authority. The record is silent as to this aspect of the case. Moreover, there is nothing in the record to indicate that the brotherhoods purported to act in the state courts on behalf of the plaintiffs or any other employees.

We conclude that, insofar as plaintiffs' individual rights in asserting grievances before the National Railroad Adjustment Board and otherwise, are concerned, neither the Railway Labor act nor the contract authorized the brotherhoods to represent plaintiffs, in the state court action. The

rights of plaintiffs to work under the contract were valuable personal rights which could not be affected or destroyed by a court decision in an action to which they were not parties and in which they did not appear either personally or by a duly authorized representative. While the brotherhoods were authorized by the Railway Labor act to bargain [fol. 89] for and execute the agreement of September 1, 1942 on behalf of the State Belt Railroad employees, including plaintiffs, and were also authorized to submit plaintiffs' grievance disputes to the National Railroad Adjustment Board (if plaintiffs so elected), all as provided in the act, their authority did not extend into the distinctly different field of representing plaintiffs in a court action where their individual rights as employees, under the contract, were being attacked.

It is clear from the reading of the act that the rights of employees are personal to them and distinct from the rights of the brotherhood and its members. This is recognized by the statutory provisions above cited to the effect that an employee's dispute may be *by him* referred to the Adjustment Board and that he may appear there *in person*, or by counsel or other representative, *as he may elect*. We are not here concerned with the rights which the brotherhoods themselves gained by the execution of the contract. We are concerned with the rights which the employees of State Belt Railroad obtained by the execution of that contract.

We, therefore, conclude that the holding in *State v. Brotherhoods* is not *res judicata* here as against plaintiffs.

2. Untrammelled by the doctrine of *res judicata* and it being conceded that the State Belt Railroad is a common carrier engaged in interstate commerce, we hold that the Congress has power to regulate it, pursuant to Art. 1, § 8, of the United States Constitution, which provides:

"The Congress shall have Power * * * To regulate Commerce * * * among the several States, * * *"

Pursuant thereto, congress enacted the Railway Labor act,¹ the terms of which, it is contended by plaintiffs, apply to the State Belt Railroad although it is owned by a state.

¹ 45 U. S. C. A., § 151, *et seq.*

When used in the Railway Labor act, the term "carrier" "includes any * * * carrier by railroad, subject to the Interstate Commerce Act, * * *." ⁸ The Interstate Commerce act ⁹ provides that it "shall apply to common carriers engaged in * * * the transportation of passengers or property wholly by railroad * * * from one State or Territory of the United States, or the District of Columbia, [fol. 90] to any other State or Territory of the United States, or the District of Columbia * * *."

A railroad which lies wholly within one state is subject to the Interstate Commerce act if it participates in the movement of persons and property from one state to another, *United States v. Union Stock Yard*, 226 U. S. 286, *Dearing v. United States*, 167 F. 2d 310.

Whether the railroad is owned by a corporation or a political entity is not a part of the test of whether it is subject to the act. A functional test only is provided by the act. In *City of New Orleans v. Texas & Pac. Ry. Co.*, 195 F. 2d 887, at 889, the court said:

"The Public Belt is a railroad, though owned by the City. So long as it engages in interstate and foreign commerce it is subject to the federal law and the Interstate Commerce Commission, like any other railroad."

In *New Orleans Public Belt R. Com'n. v. Ward*, 195 F. 2d 829, the court, in considering the application of the Railway Labor act to the Public Belt Railroad, expressly rejected the decision of the California Supreme Court in *State v. Brotherhoods*, *supra*, saying at 831:

"We do not think that the decision of the California Supreme Court on the coverage of the Railway Labor Act, 45 U. S. C. A., § 151 *et seq.*, is consistent with one of the main designs of that act 'to avoid any interruption to commerce or to the operation of any carrier engaged therein' by requiring resort to the procedures it provides in the event of disputes 'before they reach acute stages that might be provocative of strikes.'"

⁸ 45 U. S. C. A., § 151, First.

⁹ 48 U. S. C. A., § 1.

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 242, 70 S. Ct. 577, 579, 94 L. Ed. 795. Nor does that decision accord full recognition to the broad definition of the term 'carrier' in the Railway Labor Act."

We said, in *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen*, 229 F. 2d 926, at 932, that the Railway Labor act, as amended in 1934, "is directed to the needs of the railroad industry, employers and employees alike, having in mind the paramount interest of the public."

Sec. 1 of the Railway Labor act¹⁰ defines the term "carrier", as used in that act, in such broad terms as to include a railroad engaged in interstate commerce and owned by a state. The act contains no language exempting a state-owned railroad. In *United States v. State of California*, 297 U. S. 175, the State Belt Railroad was held to be subject to the federal Safety Appliance act.¹¹ In *Maurice v. State of California*, 43 Cal. App. 2d 270, 110 P. 2d 706, the same railroad was held to be subject to the federal Employers' Liability act¹² and in *State of California v. Anglim*, 129 F. 2d 455, it was held to be subject to the federal Carriers Taxing act.¹³

We, therefore, conclude that the Railway Labor act is applicable to the State Belt Railroad in this case.

3. By the same reasoning as set forth in point one hereof, we conclude that the concession made by the brotherhoods in *State v. Brotherhoods*, *supra*, to the effect that the contract which resulted from collective bargaining between the brotherhoods and the Harbor Board "has never been approved by the Department of Finance,"¹⁴ is not binding upon the plaintiffs in this suit. There the California court had no occasion to, and did not, consider whether there had been an approval. Here that question is open for consideration.

¹⁰ 45 U. S. C. A., § 151.

¹¹ 45 U. S. C. A., § 1, *et seq.*

¹² 45 U. S. C. A., § 51, *et seq.*

¹³ 45 U. S. C. A., § 261, *et seq.*

¹⁴ 232 P. 2d 857, at 859.

Does this record show that the Department of Finance approved the contract of September 1, 1942? In determining that question we are bound by the law of California, which is the common law of England; so far as it is not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of California. *People v. Statley*, 91 Cal. App. 2d 943; 206 P. 2d 76, at 78, citing § 4468, Political Code of California. To the same effect are *Victory Oil Co. v. Hancock Oil Co.*, 125 Cal. App. 2d 314; 270 P. 2d 604, at 609, citing decisions of the California Supreme Court, in *In re Elizalde's Estate*, 182 Cal. 427, 432; 188 P. 560 and *Estate of Apple*, 66 Cal. 432, 434; 6 P. 7. If the constitution, statutes and court decisions of California furnish no rule by which to determine the question before us, we are required to determine it by resort, in that effort, to any authoritative court decisions enunciating the common law of England in this respect. Before [fol. 92] doing so, however, we point out the following material facts appearing in the record before us.

Early in 1942 the Harbor Board and representatives of the two brotherhoods entered into collective bargaining, which culminated in an agreement, effective September 1, 1942, establishing rates of pay for plaintiffs and other persons similarly employed by the Harbor Board and which also established rules of employment and working conditions for these employees. The Board operated the State Belt Railroad and applied the provisions of said agreement from September 1, 1942 and until on and after November 13, 1951,¹⁵ during which time plaintiffs and other enginemen and trainmen employees rendered service to the Harbor Board and received their pay under said agreement. During that period, claims were filed by or on behalf of employees of the Harbor Board with the Adjustment Board and awards were rendered thereon.

The powers and duties of the Department of Finance are specified in California Governmental act, § 13290, *et seq.* Significant provisions thereof are (§ 13294) that it "shall examine and expert the books of the several State agen-

¹⁵ This is the date when the United States Court denied certiorari in *State v. Brotherhoods*.

cies, at least once in each year, and as often as the director deems necessary." (§ 13921) "may require from all such agencies of the State financial and statistical reports, duly verified, covering the period of each fiscal year."; and (§ 13293) "may examine all records, files, documents, accounts and all financial affairs of every agency mentioned in Section 13290."

The Harbor Board is a state agency of California. Its operation of the State Belt Railroad along the docks of one of the busiest and largest maritime ports in the world was as open and notorious as any business operation could possibly be. It was in, or at the doors of, the great city of San Francisco. The officials and employees constituting the Department of Finance of California necessarily were informed of and knew of its operation. They were bound to know that it belonged to the state of California. They were assumed to possess average intelligence and, therefore, to know that the enginemen and other employees engaged in operating that railroad were being paid by the Harbor Board which controlled and managed it. Those operating the Department of Finance had a statutory duty [fol. 93] to examine the books of the Harbor Board at least once in each year, and had the right to examine all of its records, files, documents, accounts and all financial affairs, as well as the right to require from the Harbor Board financial and statistical reports, covering the period of each fiscal year.

Not only did the state pay the salaries provided for by the contract in question for a long period of time, but the plaintiffs and others were thereby induced to render the services required of them and, in order to lay an apparently legal basis for seniority rights, refrained from leaving the employment of the Harbor Board.

The foregoing undisputed circumstances support either of two conclusions. The first is that there was actually an approval of this contract contemporaneously with its execution in 1942 and that the subsequent events prove that fact. The second conclusion is that, even if there was no contemporaneous approval by the department, there was actually, from time to time as salaries were paid from state moneys, tacit approval of the contract under which they were paid.

It should be noted that § 18004 speaks of an approval by the State Department of Finance, but it does not state what form the approval must take.¹⁶ However, we find from the recent case of *Tren v. Kirkwood*, 42 Cal. 2d 602, 268 P. 2d 482, at 487 (1954), that the California Supreme Court, in construing this statute, has indicated that a tacit approval by the department may reasonably be inferred from circumstances. Not finding any other determination in the decisions of California as to the common law applicable to this situation, we turn elsewhere.

The United States Supreme Court in *Bank of America v. Dandridge*, 25 U. S. (12 Wheat.) 64, 6 L. Ed. 552, enunciated the principles of the common law which we find applicable here. That was a suit brought by the bank on the official bond of its cashier. It became necessary for the [fol. 94] bank to prove that its board of directors had approved the bond. Justice Story pointed out that it was conceded that no record of the approval of the bond existed. Applying the common law, he pointed out (6 L. Ed. 558) that the charter of the bank did not, in terms, require that such an approval should be by writing or entered of record. At 559, he said:

"There may be, and undoubtedly there is, some convenience in the preservation of minutes of proceedings by agents; but their subsequent acts are often just as irresistible proof of the existence of prior dependent acts and votes, as if minutes were produced. If a board of directors were created to erect a bridge,

¹⁶ In its brief in this court, the State of California sets forth in an appendix the majority opinion and dissenting opinion in *State v. Brotherhoods*, 232 P. 2d 857. In dissenting, Justice Carter said that the majority opinion sets forth "the additional ground for invalidating the contract that it was not approved by the Department of Finance of the State. * * *". He held that "There has been a substantial, although informal, approval by the state of the contract. It has been in force since 1942, and wages have been paid according to the rates provided for therein since that time. The Department of Finance knew of such payments and gave implicit approval of them, * * *".

or make a canal or turnpike, and they proceeded to do the service, and under their superintendence there were persons employed who executed the work, and the board proceed to pay them therefor out of funds in their hands, these facts of public notoriety would be as irresistible evidence of the due execution of their authority, and of due contracts made, and proceedings had by the board, as if the proceedings were recorded in the most formal and regular manner. * * * A board may accept a contract, or approve a security by vote, or by a tacit and implied assent. The vote or assent may be more difficult of proof by parol evidence than if it were reduced to writing. But surely this is not a sufficient reason for declaring that the vote or assent is inoperative. * * * All that the bank is interested in, is that there shall be an approval; and it matters not whether the fact is established by a direct record, or by acts of the directors, which recognize its prior existence."

Thus, in the case at bar the events, subsequent to the execution of the contract, including the payment of salaries periodically for several years by the Harbor Board to plaintiffs and other employees covered by that contract, openly and notoriously occurring under the supervisory eye of the Department of Finance, whose duty it was to scrutinize all of the fiscal operations of the Harbor Board, are convincing proof that it had approved the contract contemporaneously with its execution. Any other deduction from these undisputed facts would lead to a conclusion that that department had been guilty of an unprecedented and prolonged dereliction of duty or an abdication [fol. 95] of the very functions for which it existed. In the absence of any evidence that the Department of Finance disapproved the contract, the evidence before us requires us to hold that the approval of the department, as required by § 18004; was given when the contract was executed.

Secondly, the same facts as hereinbefore set forth sustain the conclusion, which we also reach, that the payment of salaries from time to time over a period of several years, under the supervision of the Department of Finance, con-

stituted its tacit, effective, legal approval of the contract in question.

While not necessary for the conclusions which we have just reached, we point out the inequity of any court at this time declaring the contract void to the detriment of the seniority rights of plaintiffs based upon service rendered by them under said contract. This case was brought in a court of equity and such result would be abhorrent to equitable principles.

Under the heading "Position of State of California on other issues", the state contends *inter alia* that, if the contract is valid and may be enforced, the authority of the Adjustment Board to decide the instant claims is precluded by the provision in the contract that a system board—the State Personnel Board—shall hear and decide these claims (citing 45 U. S. C. A., § 153—Second). In its brief herein the state makes no further reference to this contention ignoring it in its "summary of argument", "propositions of law relied on and citations of authorities" and in the body of its argument. (See rule 16 of this court referring to the contents of briefs.) No reference thereto was made in oral argument before this court. Under these circumstances we treat this contention as waived. For the same reason we consider as waived in this court the contentions of the state set forth in the footnote.¹⁷

Accordingly, the judgment order of the district court is reversed and this cause is remanded to that court with

¹⁷ "• • • (c) If the Railway Labor Act is held to be applicable to the State of California, then the Act is an unconstitutional interference with a state's relationship with its employees. (d) The contract is also invalid because the Harbor Board lacked authority to negotiate terms of the contract in conflict with the State Constitution and civil service laws. • • • (f) If, nevertheless, the Adjustment Board does have jurisdiction over these claims the Board should not be required to render awards because such awards could not be enforced against the State of California in the Federal courts as the Railway Labor Act provides, because of the inhibition of the Eleventh Amendment of the United States Constitution."

[fol. 96] instructions to enter a decree granting to plaintiffs the relief for which they specifically pray in their complaint.

{fol. 97] IN UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Before Hon. Philip J. Finnegan, Circuit Judge, Hon. Walter C. Lindley, Circuit Judge, Hon. Elmer J. Schnackenberg, Circuit Judge.

No. 11573

HARRY TAYLOR, PETER A. CALUS, JAMES W. BREWSTER, WILLIAM J. LANGSTON AND H. C. GREER, PLAINTIFFS-APPELLANTS

vs.

L. B. FEE, ET AL., DEFENDANTS-APPELLEES, AND STATE OF CALIFORNIA, INTERVENING DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

JUDGMENT—April 23, 1956

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED with costs; and that this cause be and the same is hereby REMANDED to the said District Court with instructions to enter a Decree granting to plaintiffs the relief for which they specifically pray in their complaint, in accordance with the opinion of this Court filed this day.

[fol. 98] IN UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—June 7, 1956

It is ordered by the Court that the petition for a rehearing filed by the State of California be, and the same is hereby, denied.

[fol. 99] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 100-101] SUPREME COURT OF THE UNITED STATES,
October Term, 1956

No. 385

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed December 10, 1956

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar. The Solicitor General is invited to file a brief, as *amicus curiae*.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

[fol. 102]

Original

IN THE SUPREME COURT OF THE UNITED STATES; OCTOBER
TERM, 1956

No. 385

STATE OF CALIFORNIA, PETITIONER

vs.

HARRY TAYLOR, PETER A. CALUS, JAMES W. BREWSTER, WIL-
LIAM J. LANGSTON AND H. C. GREER, RESPONDENTS, AND
L. B. FEE, ET AL., ETC., ET AL., RESPONDENTS

STIPULATION—Filed January 18, 1957

It is hereby stipulated by and between counsel for the
respective parties to the above entitled cause that

1. The dockets before the National Railroad Adjustment
Board, referred to on pages 33 and 34 in the transcript of
record in the United States Court of Appeals for the Sev-
enth Circuit in the case of *Harry Taylor, et al. v. L. B. Fee,*
et al., and *State of California*, No. 11, 573, may form an
additional part of the certified record before the United
States Supreme Court, *but are not to be part of the printed*
record; provided, however, that the Schedule of Rates of
Pay and Working Conditions Covering Locomotive En-
gineers, Firemen and Hostlers Represented by the Brother-
hood of Locomotive Firemen and Enginemen and the Yard
Engine Foreman and Helpers Represented by the Brother-
[fol. 103] hood of Railroad Trainmen Employed on the
State Belt Railroad, Effective September 1, 1942 constitut-
ing part of Docket 25,034 shall be printed.

2. Either of the parties may refer in their briefs and ar-
guments to the record filed in the Supreme Court of the
United States, including any part thereof which has not
been printed.

Dated: January 11, 1957.

Adams, Williamson & Turney, By Burke Williamson,
Counsel for Respondents, Edmund G. Brown, At-
torney General for the State of California, By Her-
bert E. Wenig, Assistant Counsel for Petitioner.

[fol. 104]

Schedule of
Rates of Pay and Working Conditions
Covering

Locomotive Engineers,
Firemen and Hostlers
represented by the

Brotherhood of Locomotive Firemen and Enginemen
and the

Yard Engine Foreman and Helpers
represented by the

Brotherhood of Railroad Trainmen
employed on the
State Belt Railroad

Effective September 1, 1942.

[fol. 105] The following rates of pay and rules for locomotive engineers, firemen, hostlers, engine foremen and helpers employed on the State Belt Railroad are effective September 1st and shall remain in effect for one year and thereafter, subject to the provisions of Article 28 of this agreement.

Article 1

Rates of Pay

Section 1.

| | Per Hour | Per Day | Overtime Per Hour |
|----------------------------|----------|---------|----------------------|
| Engineers..... | \$1.18 | \$9.44 | \$1.77 |
| | 1.23 | 9.84 | 1.85 |
| | 1.28 | 10.24 | 1.92 |
| Firemen..... | 0.96 | 7.68 | 1.44 |
| | 1.01 | 8.08 | 1.52 |
| | 1.06 | 8.48 | 1.59 |
| Yardmaster..... | 1.55 | 12.40 | 2.33 |
| | 1.60 | 12.80 | 2.40 |
| | 1.65 | 13.20 | 2.48 |
| Assistant Yardmaster..... | 1.41 | 11.28 | 2.12 |
| | 1.46 | 11.68 | 2.19 |
| | 1.51 | 12.08 | 2.27 |
| Switch Engine Foreman..... | 1.14 | 9.12 | 1.71 |
| | 1.19 | 9.52 | 1.79 |
| | 1.24 | 9.92 | 1.86 |
| Switchmen..... | 1.08 | 8.64 | 1.62 |
| | 1.13 | 9.04 | 1.70 |
| | 1.18 | 9.44 | 1.77 |

Note.—Increases—basic rate of pay in each instance is based upon the length of service with the State Belt Railroad and in accordance with Civil Service Rules of the State Personnel Board.

{fol. 106} Section 2. In the event Diesel-electric, oil-electric, gas-electric, Diesel, gas, electric, or any other form or type of power is installed as a substitute for steam locomotives, an engineer from the seniority list of engineers and a fireman from the seniority list of firemen shall be employed on all such motive power the same as are now employed on steam locomotives, and the rates of pay shall be the same as on steam locomotives.

Article 2

Basic Day

Section 1. Eight hours or less shall constitute a day's work; time to begin when required to report for duty and to end at time released from all duty. Registering on and off duty, and making out reports, shall be considered as time on duty.

Section 2. Should a regularly assigned foreman or helper, after commencing work on assigned crew, be detached therefrom and required to perform service on another crew, he shall be compensated not less than a minimum day on each assignment.

Section 3. Should an extra yardman filling vacancy on a regular assigned crew, or used to augment a regular assigned crew, be detached therefrom after commencing work and used to fill vacancy on another crew or augment another crew, he shall be paid not less than a minimum day on each crew.

Section 4. Extra yardmen, after starting work on an extra crew and used during the same shift with another regular or extra crew, shall be paid not less than a minimum day on each crew.

{fol. 107}

Article 3

Overtime

Section 1. Except when exercising seniority rights from one assignment to another, all time worked in excess of eight hours in a 24-hour period, shall be paid for as overtime on the minute basis, at one and a half times the hourly rate.

Article 4

Assignments

Section 1. Enginemen and yardmen shall be assigned for a fixed period of time, which shall be for the same hours daily for all regular members of a crew. So far as it is practicable, assignments shall be restricted to eight hours' work.

Question: Is it permissible to have regular crew on an assignment for a given number of hours and have one or more members thereof on an assignment of a lesser number of hours?

Answer: No regular member of the crew shall be assigned for a lesser number of hours than the number of hours for the crew as a unit.

Section 2. Should regular assigned men be relieved from duty prior to close of shift, and overtime is earned by other members of crew, man so relieved will be paid the same as if he had continued on duty until close of shift.

Example: One member of crew works 3 p.m. to 12 midnight and is relieved. Other members of crew continue until 1 a.m. Man relieved will be compensated the same as if continued with crew until close of shift, 1 a.m.

[fol. 108]

Article 5

Bulletining Vacant Positions

Section 1. All new assignment positions, or a permanent vacancy on a regular assignment, or a temporary vacancy of fifteen (15) days or more, shall be advertised by bulletin for a period of forty-eight (48) hours and the senior qualified man making application shall be assigned.

Section 2. It is understood that when an extra crew works for six consecutive days on any one shift; i.e., first shift between hours 6:30 a.m. and 4 p.m.; or second shift between hours 2:30 p.m. and 12 midnight; or third shift between hours 10:30 p.m. and 8:00 a.m., such crew will be considered a regular assignment and will be advertised by bulletin as provided in Section 1.

Article 6

Lunch Time

Section 1. Crews will be allowed 20 minutes for lunch between four and one-half and six hours after starting work, without deduction in pay or time therefor.

Section 2. Crews will not be required to work longer than six hours without being allowed 20 minutes for lunch, with no deduction in pay or time therefor.

Question: If a yard crew, through some unforeseen circumstances, be on duty say 14 hours, would the crew be entitled to a second period of 20 minutes in which to eat; and, if so, when would it begin?

Answer: Section 2 applies to both the first and second lunch periods. Crew would be entitled to the second lunch period six hours after completing the first lunch period. In [fol. 109] either case, crews will not be worked longer than six hours without being given an opportunity to eat.

Question: Under Sections 1 and 2, provisions for lunch periods, must they be given within the prescribed time?

Answer: Yes. The lunch period must be given and completed within four and one-half and six hours.

Article 7

Starting Time

Section 1. Regularly assigned crews shall each have a fixed starting time, and the starting time for a crew will not be changed without at least forty-eight (48) hours' advance notice.

Section 2. The time for the first shift to begin work will be between 6:30 a.m. and 8 a.m.; the second between 2:30 p.m. and 4 p.m., and the third between 10:30 p.m. and 12 midnight.

Section 3. Crews working on extra engines, if the extra engine works six days within seven days, shall be compensated as follows:

(a) Starting at various times between 6:30 a.m. and 2:29 p.m. compensate as follows: Starting between 6:30 a.m. and 8 a.m., compensate on basis of actual starting time;

starting between 8 a.m. and 2:29 p.m., compensate as if brought on duty at 8 a.m.

(b) Starting at various times between 2:30 p.m. and 10:29 p.m. to compensate as follows: Starting between 2:30 p.m. and 4 p.m., compensate on basis of actual starting time; starting between 4 p.m. and 10:29 p.m., compensate as if brought on duty at 4 p.m.

(c) Starting at various times between 10:30 p.m. and 6:29 a.m., compensate as follows: Starting between 10:30 p.m. and 12 midnight compensate on basis of actual starting time; starting between 12 midnight and 6:29 a.m., compensate as if brought on duty at 12 midnight.

(d) Extra engines working less than six days within seven, crews will be compensated on the basis of actual starting time.

Section 4. Should a condition arise whereby it is considered necessary to start a regular engine at a time other than that prescribed by the provisions of this article, the chairman of the committees representing the engine and yard service employees will meet with proper representatives of the State Belt Railroad for the purpose of considering and adjusting same.

Article 8

Calculating Assignment and Meal Periods

The time for fixing the beginning of assignment or meal period is to be calculated from the time fixed for the crew to begin work as a unit, without regard to preparatory or individual duties.

Article 9

Designated Point—Beginning and Ending of Day

Crews shall have a designated point for going on and off duty and their pay shall continue until they reach the point at which they started to work.

[fol. 111]

Article 10

Yardmen Filling Positions of Others

Yardmen or enginemen filling higher positions of others who are absent from duty or crews will receive the same rates of pay as the employee so relieved, provided, however, men so employed will received not less than they would have received had they remained in the regular positions.

Article 11

Extra Service

Section 1. (a) A list of extra yardmen will be maintained and the senior available extra yardman (helper) will be used to fill a vacancy created by a regularly assigned man laying off, or for other extra service. However, an extra yardman will not be allowed to work through two shifts, nor to work on a second shift on the same calendar date, when other qualified yardmen are available for the service required.

(b) A list of extra firemen will be maintained, and firemen assigned to the extra list shall be run first in, first out. In filling temporary vacancies of engineers, the senior available demoted man will be used.

Section 2. A temporary vacancy as engine foreman will be filled by the senior qualified helper on a crew assigned for the same starting time period as the crew on which the vacancy exists as engine foreman; viz., between 6:30 a.m. and 8 a.m.; 2:30 p.m. and 4 p.m., or 10:30 p.m. and 12 midnight.

Section 3. Extra men will be called two hours, as near as practicable, before time for starting work, if the call can be made by telephone. And if the senior extra man is not called in turn through no fault of his own, he shall be paid [fol. 112] four (4) hours at rate of position run around; and if no service performed on that date through no fault of his own, he shall be paid eight (8) hours for the run-around.

Extra men having telephone will furnish number thereof to officer in charge.

Section 4. Under the following circumstances, run-arounds will not be paid under this Section, and the first available extra man will be used:

(a) In case where engineman or yardman can not be found at his residence or place designated by him where he will be found when wanted for service.

(b) In case of sickness, accident, wreck, failure to report for duty, or failure to give notice set forth in Article 12.

(c) In case of telephone failures.

(d) Where extra enginemen and yardmen are required to report at stated time.

Section 5. If an extra man is called for vacancy that does not exist, and, as a result, is run-around by a junior extra man, he shall be compensated for run-around under Section 3 of this article. Under same conditions, if he is not run-around by a junior extra man, he shall receive payment of two (2) hours for erroneous call, except that if he can be used on another job starting at the same and point for which called, the two (2) hours for erroneous call, will not be allowed.

Article 12

Laying Off and Reporting for Duty

Enginemen and yardmen desiring to lay off must obtain permission of proper official at least three (3) hours in advance of the time they are due to report. Enginemen and [fol. 113] yardmen reporting for duty after lay-off must notify proper official three (3) hours in advance of starting time of assignment. Extra enginemen and yardmen desiring to lay off must obtain permission of proper official at least three (3) hours in advance of time they desire to lay off; and, on reporting for duty after lay-off, they shall give not less than three (3) hours advance notice prior to 6:30 a.m., 2:30 p.m., or 10:30 p.m. It was mutually agreed that both regular and extra men could not lay off for less than 24 hours.

Article 13

Promotion

Section 1: Yardmen will be promoted, helper to foreman, foreman to yardmaster; seniority and ability to govern. As a prerequisite to promotion to yardmaster, it will be necessary for the applicant to have served at least one (1 year (306) days as engine foreman. Should yardman promoted to yardmaster not be familiar with the work and territory which he is to supervise, he will familiarize himself with the work and territory without additional expense to the State Belt Railroad.

If senior yardman standing for promotion to yardmaster is not available as result of sickness or leave of absence, and it is necessary to temporarily promote a junior yardman, the senior yardman will be allowed five (5) days after becoming available to elect whether he desires to accept the promotion; if he elects to accept the promotion, the seniority date as yardmaster which would have been acquired by the junior yardman, shall be accorded the senior yardman, and the junior yardman will not thereby establish a seniority date as yardmaster.

[fol. 114] Should yardman qualified for promotion to yardmaster, or to fill vacancy as such, decline to accept, he will do so in writing.

Yardmen promoted to position of yardmaster will retain their seniority as yardmen. If, after yardman is promoted to regular position as yardmaster, the position is discontinued, or he is displaced, he will be privileged to exercise his yardman's seniority to acquire a position, but will not be privileged to work as yardman when his seniority entitled him to a regular position as yardmaster. If he loses position as yardmaster and if privilege to displace a yardman, such displacement must be made within five (5) days after loss of position as yardmaster, except if on leave of absence or if off duty account sickness or injury, displacement must be made within five (5) days from date of return.

Should a yardman promoted to position of yardmaster be demoted, he will be privileged within five (5) days of said demotion (or if on leave of absence on account of sickness

or otherwise within five (5) days from date of return) to displace a junior yardman. Superintendent will notify Committee Chairman of such demotion within five (5) days after demotion.

NOTE.—The title "Yardmaster" as used in this section will include Assistant General Yardmaster, Yardmaster and Assistant Yardmaster.

Article 14

Seniority

Section 1. The Senior Yardman in point of service will have the choice of engines.

A yardman taking a six-day assignment instead of a seven-day assignment which his seniority will permit him to hold, is interpreted as having taken his choice of engines, and he will not be permitted to exercise his seniority on [fol. 115] holidays on which his assignment does not work, or on lay-over or off days, except in extra service subject to rules governing extra service. Yardmen desiring to work under the above will make that fact known before completion of last shift.

Section 2. Should a helper decline promotion, he will do so in accordance with Section 3B, Rule 7, of the Rules and Regulations of the State Personnel Board.

Section 3. (a) Firemen shall rank on the firemen's roster from the date of their first service as fireman or hostler when hired for such service, and when qualified shall be promoted to positions as engineers in accordance with Sec. 112, Civil Service Act.

(b) Firemen having successfully passed the required examination for the handling and care of locomotives, and knowledge of rules and regulations adopted and enforced by the Operating Department, shall be eligible as engineers. Promotion and seniority as engineer to date from first service as engineer.

(c) The seniority date of hired engineers shall be the date of their first service as engineer when hired for such service.

(d) When, from any cause, it becomes necessary to reduce the number of engineers on the working list, those

taken off may, if they so elect, displace any fireman their junior. When reduction in force is made it will be in reverse order of seniority.

Section 4. When enginemen and yardmen are laid off account reduction in service, they will retain all seniority rights, provided they return to actual service within thirty (30) days from date they are notified to return. Men laid off shall keep the Superintendent of the State Belt Railroad [fol. 116], and the Committee Chairmen advised of current mail and telegraph address.

Section 5. Seniority lists of all enginemen and yardmen will be prepared semiannually and be posted for inspection. Committee chairmen will be furnished with a copy. Chairmen will carefully review all seniority lists so furnished; and, should any errors or omissions be discovered, they will be handled with proper authority for correction. No corrections will be made in any seniority list after three (3) months from date issued, except where corrections are pending adjustment.

Section 6. Enginemen and yardmen who voluntarily leave the service of the State Belt Railroad shall lose all rights under this agreement, and if they again enter the service must take their places as new men.

Article 15

Coupling Air and Steam Hose

Section 1. It will not be considered the duty of yardmen to couple or uncouple steam or signal hose, couple or uncouple safety chains, or unfasten vestibule curtains; nor will they be required to handle on repair track cars that have no drawbars, unless chained up by car repairing department.

Section 2. It is understood that the coupling and uncoupling of air hose between engine and first car by yardmen is a part of their duties.

Article 16

Disallowed Time

Enginemen and yardmen will be notified and reasons given when time is not allowed.

[fol. 117]

Article 17

Presentation of Grievances

Section 1. Any engineman or yardman having a grievance may present same in writing, or through his Committee, to the officer designated to handle such matters, within sixty (60) days after the occurrence. And should he not be satisfied with the decision of such officer and desires to appeal, the engineman or yardman may, within thirty (30) days thereafter, notify such officer in writing, or through his Committee, that he desires to appeal the case, together with any statement the man desires to make to the Board of State Harbor Commissioners and should he not be satisfied with their decision, he may appeal to the State Personnel Board.

Section 2. Grievances will be considered only in accordance with the above and will be handled promptly.

Section 3. Enginemen or yardmen who are dismissed may be reemployed at any time; but will not be reinstated unless case is pending in accordance with provisions of Section 1 of this article.

Article 18

Certificate of Service

Certificate of Service will be given all enginemen and yardmen leaving the service of the State Belt Railroad, who have been in the employ ninety (90) days. Such certificate will state the reasons for leaving the service.

Article 19

Attending Court or Coroner's Inquest

Section 1. Enginemen and yardmen required to attend court by the State Belt Railroad will be paid for actual time [fol. 118] time lost, also necessary expenses when away from San Francisco. Witness fees will not be deducted when computing allowances in accordance with this article.

Section 2. Enginemen or yardmen attending Coroner's inquest at the instance of the State Belt Railroad, and no time is lost by such attendance, will be paid for actual time

consumed, with a minimum of four (4) hours. Where actual time consumed is in excess of four (4) hours, one (1) day or eight (8) hours will be allowed. In each case payment will be made at pro rata rate applicable to class of service in which employed.

Article 20

Leave of Absence

Section 1. Leave of absence will not be granted to exceed thirty (30) days, with an extension of thirty (30) days, in the discretion of the Superintendent, except in case of sickness or disability; except, further, that an engineman or yardman who has been five (5) years in the service of the State Belt Railroad, may be granted leave of absence for one (1) year and retain his seniority rights, provided he does not accept position on another railroad.

Section 2. Engineman or yardman granted leave of absence for one (1) year under this article and who returns before the expiration of his leave, will be permitted to resume service and exercise his seniority in accordance with Article 13 of this agreement.

Section 3. An engineman or yardman promoted to an official position in the State Belt Railroad's service, or being exclusively employed by the Brotherhood of Railroad Trainmen, or the Brotherhood of Locomotive Firemen and Enginemen, will, in either event, retain his seniority as engineman or yardman.

Article 21

Consist of Crews

Section 1. Crews shall consist of not less than one (1) engineer, one (1) fireman, one (1) foreman and two (2) helpers, and will not work shorthanded except in case of extreme emergency.

Note.—This section shall be construed to mean that when the ground crew consists of only a foreman and two helpers, if a member of the crew is required to absent himself from the other members of the crew to perform other duties, the remaining members of the crew will not be required to per-

form switching during the absence of such member, except in an extreme emergency.

Article 22

Globes—Batteries—Footboards

Section 1. Globes and batteries for electric lanterns will be furnished by the State Belt Railroad.

Section 2. Switch engines will be equipped with footboards, front and rear; in accordance with Safety Appliance Act.

Article 23

Discipline—Investigation

Section 1. When an engineman or yardman believes he has been unjustly treated, he shall have the right to present his case in writing, or through his committee, to the superintendent, with such evidence as he may have to offer. It will be the duty of the superintendent to investigate the matter and render his decision in writing, without unnecessary delay. Should such decision be unsatisfactory, it may, on written notice to the superintendent, be appealed to proper higher authority.

Section 2. No employee governed by the provisions of this agreement shall be suspended or discharged, until he has a fair and impartial hearing before the proper officials. Ordinarily such hearing will be held within five days from date of suspension.

Section 3. In all cases where a formal investigation is held, the employee under investigation will be entitled to representation by a member of his committee or by any employee in actual service on the State Belt Railroad. The employee shall be given written notice as to the specific charge, sufficiently in advance to afford him the opportunity to arrange representation and for the attendance of any desired witnesses. Officials will require the presence of all employees whose testimony may be necessary to develop all of the essential facts. In fixing time at which investigation will be held, due consideration will be given to the need of rest by employees.

Section 4. At investigations the accused or his representative shall be confronted with all of the evidence, may

hear the testimony of all of the witnesses and shall be privileged to question any or all who may so testify. Each witness may, after testifying, remain present until the investigation is concluded. All questions and answers that constitute a part of the investigation shall be included in the transcript.

Section 5. Any disciplinary action taken shall be based upon the evidence adduced at the investigation, and the employee or his representative notified of the decision without undue delay; not exceeding ten (10) days.

[fol. 121] Section 6. Should committee man request a transcript of the testimony in any investigation that has been made, it will be furnished, also copy of any additional statements or evidence which may be used against the accused in assessing discipline.

Section 7. Enginemen or yardmen required to attend investigation shall be compensated for such attendance as follows:

(a) If investigation is conducted continuous with completion of the working shift, or is started not to exceed one (1) hour after completion of the shift, or if begun not to exceed one (1) hour in advance of starting time of shift, work and investigation shall be combined and paid for on a continuous time basis.

(b) If investigation is conducted during working shift, no additional payment will be made for attending investigation.

(c) If investigation is not conducted in accordance with Items (a) or (b), one day will be allowed.

Note:—This section will not apply if the engineman or yardman is found at fault.

Article 24

Approval of Application

The application of enginemen or yardmen entering the service of the State Belt Railroad will be approved or rejected within six (6) months. When applicant is not notified to the contrary within the time stated, it will be understood that the application is approved, but this article shall not

operate to prevent the removal from service of such applicant if subsequent to the expiration of six (6) months, it is found that information given by him in his application was false.

[fol. 122]

Article 25

Sick Leave with Pay

Section 1. Employees shall be entitled to 12 days sick leave, excluding Sundays and holidays, with pay for a calendar year of service, or one day of sick leave with pay for a calendar month of service on the submission of satisfactory proof thereof as provided by rule of the State Personnel Board. The State Personnel Board shall, by rule provide for the granting of additional sick leave, with or without pay, or with reduced pay, or for accumulation of sick leave, provided that in the event the superintendent refuses to recommend such sick leave, the employee may appeal to the Board of State Harbor Commissioners and then to State Personnel Board, whose decision shall be final.

Section 2. If any employee covered by this agreement does not take the full amount of sick leave allowed in any calendar year, the amount not taken may be accumulated from year to year, to the total of one hundred (100) working days. Such accumulation may be used under the condition specified above, when required.

Section 3. Sick leave is hereby defined to mean the absence from duty because of illness, exposure to contagious disease, attendance upon a member of his immediate family seriously ill and requiring the care or attendance of such employee, or death in the immediate family of the employee.

Section 4. The Board of State Harbor Commissioners will require evidence in the form of a physician's certificate, or otherwise, of the adequacy of the reason for any employee's absence during the time for which sick leave is requested. The day or days for which sick leave is recommended by the superintendent shall be reported monthly to the board, and/or at such time as may be required by the board.

[fol. 123]

Article 26

Annual Vacation

Section 1. Each employee in the service of the State Belt Railroad, covered by this agreement, after six (6) months of continuous service, shall be entitled to vacation on the basis of one and one-quarter ($1\frac{1}{4}$) working days for each month or major portion of a month of service up to the first of January next following the completion of such six (6) months of service. Thereafter, the employee shall be entitled to a vacation of fifteen (15) working days in each calendar year.

Section 2. In the event an engineman or yardman is unable to take the vacation to which he is entitled in any period, he shall be permitted to accumulate it to his credit and in the next succeeding year may take a total vacation of not more than thirty (30) working days. In the event he is unable to take the full thirty (30) days of accumulated vacation, the unused portion may be accumulated to his credit for the following year, except that he shall at no time be entitled to a greater total than thirty (30) working days.

Section 3. The time at which the engineman or yardman shall be granted a vacation is in the discretion of the Superintendent of the State Belt Railroad. In the event he does not provide for a vacation for an engineman or yardman for two successive years, such engineman or yardman may take, as a matter of right, not more than fifteen (15) days of accumulated vacation at the end of the second of such [fol. 124] successive calendar years. The remaining balance which may at that time be to his credit may be forwarded to the next year.

Section 4. When an engineman or yardman permanently leaves the service of the State Belt Railroad and has not been granted his vacation, he shall be entitled to unused portions of vacation accumulated from previous year and to vacation on the basis of one and one-quarter ($1\frac{1}{4}$) days for each month or major portion of a month of service from the first of the calendar year until the date of his leaving the service, but not to exceed thirty (30) working days.

Section 5. The superintendent shall arrange to keep

proper records and schedules of vacations granted or due each engineman and yardman covered by this agreement.

Article 27

Interpretation of Agreement

If any question should arise as to the proper interpretation of any article of this agreement, the dispute will be referred to the chief operating officials of the State Belt Railroad for decision. Before rendering such, the officials will arrange a meeting with the committees a party to this agreement, and any decision they jointly reach will be final unless properly appealed to higher authorities.

Article 28

This agreement between officials of the State Belt Railroad and representatives of the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen shall continue in effect, subject to any municipal, State or Federal legislation, for a period of one [fol. 125] (1) year from date of consummation, and shall continue in effect thereafter until either party desiring to change any of the foregoing rules or regulations shall have given to the other party thirty (30) days' notice, in writing, of the change, or changes, desired.

For the Board of State Harbor Commissioners

J. F. Marias, President

Harry See, Commissioner Geo. Sehlmeier, Commissioner

For the Brotherhood of
Locomotive Firemen
and Enginemen

R. J. Brooks,
Deputy President

Thomas S. Malin,
Chairman

For the Brotherhood of
Railroad Trainmen

R. J. Brooks,
Deputy President

Harry Bolen,
Chairman

6558



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**PETITION
FOR
A WRIT OF
CERTIORARI**

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JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 385

STATE OF CALIFORNIA,

vs.

Petitioner,

HARRY TAYLOR, PETER A. CALUS, JAMES W.
BREWSTER, WILLIAM J. LANGSTON and
H. C. GREER,

Respondents,

and

L. B. FEE, et al., etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1956

No.

STATE OF CALIFORNIA,

Petitioner,

vs.

HARRY TAYLOR, PETER A. CALUS, JAMES W.

BREWSTER, WILLIAM J. LANGSTON and

H. C. GREER,

Respondents,

and

L. B. FEE, et al., etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Seventh Circuit.

Petitioner, State of California, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above case on April 23, 1956.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court (R. 57-66) is reported in 132 F.Supp. 356. The opinion of the Court of Appeals for the Seventh Circuit, printed in Appendix A hereto, is reported in 233 F.2d 251. The conflicting opinion of the Supreme Court of California in *California v. Brotherhood of Railroad Trainmen*, 37 Cal.2d 412, 232 P.2d 857, is printed in Appendix B.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 23, 1956 (App. A). A timely petition for rehearing was filed on May 23, 1956, and was denied on June 7, 1956 (App. A, p. 21). The jurisdiction of this court is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED.

The mandate of the Circuit Court orders the National Railroad Adjustment Board to hear and decide claims against the State of California allegedly filed under the provisions of section 3 of the Railway Labor Act (U.S.C. §153i) by State employees engaged upon the work of the State Belt Railroad, which railroad is owned and operated by California and is engaged in interstate railroad commerce as part of the facilities of the Harbor of San Francisco.

1. Whether Congress intended the general provisions of the Railway Labor Act (45 U.S.C. §151 *et seq.*), pro-

viding for collective bargaining and enforcement of collective bargaining contracts in interstate railroad commerce, to apply to a State?

2. If the Act applies to a State operated railroad, whether Congress has the constitutional authority in the manner of the Railway Labor Act to control a State's employer-employee relationship?

3. Whether the contract enforcement procedures invoked herein against a State, are prohibited by the Eleventh Amendment to the United States Constitution?

4. Whether the Railroad Adjustment Board can be ordered to make awards under a collective bargaining contract, which is in conflict with and violates the civil service laws of California?

STATUTES INVOLVED.

The statutory provisions involved are The Railway Labor Act (45 U.S.C. §§151-163, the pertinent portions of which are printed in App. C); section 1 of the Interstate Commerce Act (49 U.S.C. §1, App. D); Amendment XI, United States Constitution; Article XXIV, California Constitution; State Civil Service Act, California Government Code sections 18500 *et seq.* (App. E); California Harbors and Navigation Code sections 1700, 1732, 1732.7, 1990, 3084, 3150 (App. F).

STATEMENT OF THE CASE.

The State of California as part of the facilities of San Francisco Harbor owns and operates, through a Board of State Harbor Commissioners, a terminal switching railroad, paralleling the water front of San Francisco and serving wharves and industrial plants in the Harbor area. It is known as the "State Belt Railroad" and operates on a non-profit basis (Calif. Harbors and Navigation Code secs. 3150, 3084, App. F). It is conceded that the State Belt is engaged in interstate commerce as it connects with interstate railroads serving the San Francisco Harbor area.

California's Constitution provides that State Belt employees are members of State civil service (Calif. Const., Art. XXIV, App. E). Under California's "State Civil Service Act", the employment, classification, promotion, salary ranges and general working conditions of all members of civil service are governed by the provisions of the Constitution and by regulation of the State Personnel Board (Calif. Const., Art. XXIV; Calif. Gov. Code, secs. 18500-19765, App. E).

On September 1, 1942, the Harbor Board of San Francisco, in response to a claim by the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen that California was subject to the Railway Labor Act, made a collective bargaining contract with these Brotherhoods as the representatives of the State Belt employees. The contract provided for rates of pay and working conditions. A number of these provisions were in conflict with those of the "State Civil Service Act". On various dates between 1949 and 1951 the

said Brotherhoods on behalf of the five plaintiffs in the present action, filed claims with the National Railroad Adjustment Board.

A subsequent Harbor Board, through the California Attorney General, brought a declaratory judgment action in the California courts to determine (1) if the State of California was subject to the Railway Labor Act; (2) if the Harbor Board could enter into a collective bargaining agreement in conflict with the State Civil Service Act; (3) if the particular contract which had been negotiated by a former Board, was valid. The California Supreme Court (*California v. Brotherhood of Railroad Trainmen*, 37 Cal. 2d 412, 232 P.2d 857, App. B) held that:

(a) Congress did not intend the Act to control a State's employer-employee relationship.

(b) The particular contract was invalid under California law because the California Department of Finance had not approved the contract.

This court denied certiorari (342 U.S. 876).

Jurisdiction of the Courts Below.

Following denial of certiorari, the carrier members of the First Division of the National Railroad Adjustment Board advised the labor members that, on the basis of the ruling in the California case, the Board had no jurisdiction to hear State Belt claims, and would not participate in the handling of pending State Belt dockets, other than to dismiss them (R.11-12). Thereupon, on January 14, 1953, five State Belt employees for whom claims had been filed, brought an action in the District Court for the Northern District of Illinois, Eastern Division, seeking

an injunction against the carrier members and Executive Secretary of the First Division to require them to hear and make awards on the claims which had been filed. Jurisdiction of the District Court was asserted on the ground that the Adjustment Board maintains its headquarters in Chicago, Illinois (45 U.S.C. §153(1)(r)) and that the action was one arising out of an Act of Congress regulating commerce (28 U.S.C. §1337).

The United States through the United States Attorney General answered on behalf of the First Division of the National Railroad Adjustment Board and the Executive Secretary thereof, and admitted all of the allegations of the complaint and joined in plaintiffs' request for relief (R.13) and also moved for a summary judgment (R.30).

The carrier members of the First Division appeared by special counsel. Among other defenses, the carrier members asserted that their jurisdiction was limited to the interpretation and application of valid agreements, and that they lacked jurisdiction of disputes concerning the validity of agreements. With this reference, it was asserted that the California Supreme Court had held that the State Belt Railroad was not subject to the Railway Labor Act and that the particular contract upon which the claims before them were based, was invalid as a matter of California law (R.18, 22). California, asserting that it was the real defendant party in interest (R.24), was permitted to intervene (R.28). California concurred in the defenses raised by the carrier members and also asserted that the relief sought by the action should not be granted because:

1. The Railway Labor Act was not applicable to a State;

2. If the Act was held applicable, it was an unconstitutional usurpation of the right of a State to control its relationship with its employees.

3. California had not consented to be sued before the Board or in the District Court, and that both the claims before the Board and the action were barred by the Eleventh Amendment.

4. The contract was also invalid because the former Harbor Board lacked authority to agree to all-pervading provisions of the contract which were in conflict with the California "State Civil Service Act" (R.25, 26, 27).

5. Under section 3, second, of the Railway Labor Act and the contract, if valid, the California State Personnel Board had jurisdiction to decide plaintiffs' claims (45 U.S.C. 153(2)).

California (R.31), the United States (R.30), and plaintiffs (R.36) moved for summary judgments. The District Court granted California's motion for summary judgment on the ground that the jurisdiction of the Adjustment Board was limited to the interpretation and application of valid contracts and that "it must give conclusive effect" to the California decision (i.e., *California v. Brotherhood of Railroad Trainmen, supra*) which held that the collective bargaining contract was invalid as a matter of State law, because the contract had not been approved by the California Department of Finance (App. B, p.34). On appeal, the Court of Appeals held that the question of approval was one of fact which it could decide and held that, on the basis of the record before it,

the contract, although not expressly approved, had been approved by implication (App. A). Thereupon, the court held that the "Railway Labor act is applicable to the State Belt Railroad in this case" (App. A, p. 11). Judgment was ordered entered directing the District Court to grant plaintiffs the relief prayed for (App. A, p. 19).

It will be noted that the District Court did not pass upon the issue of constitutionality, the bar of the Eleventh Amendment, the invalidity of the contract because it violated California civil service laws, or the jurisdiction of the California State Personnel Board rather than the Adjustment Board to decide plaintiffs' claims (R.63). As one of the respondents on appeal from the summary judgment of dismissal in its favor, California stated its position on these issues (App. H, pp. 86-87). It urged however, that, if the District Court were correct in regarding as decisive of the Adjustment Board's lack of jurisdiction, the California Court's ruling that the contract was invalid, that would readily dispose of the appeal from the summary judgment (Brief of California as Inter-Def.-Appl., App. H, pp. 86-88). If the court overruled the District Court on this point, then the Court of Appeals would be confronted with the issues which had been presented below and could pass upon them itself or remand to the District Court for further decision. It appeared to California that this would be an orderly and time-saving procedure and that if the Circuit Court were to retain the case, California desired an opportunity to brief these other issues. However, the Circuit Court treated all these important and decisive issues as waived (App. A, p. 17). In its petition for rehearing, California contended that it was

being deprived of its day in court on these determinative issues. These issues were briefed and the Circuit Court was asked to pass upon them (Pet. for Rehrg., App. H, pp. 89-94)*. Rehearing was denied (App. A, p. 21).

POINTS NOT TO BE URGED HERE.

As California is anxious to reach the basic issue of the application of the Act and the impact of its collective bargaining requirements upon its civil service system, it is not urging here the following points:

1. Whether the California decision holding the State not to be subject to the Railway Labor Act and the particular contract invalid, was *res judicata*.
2. Whether the Circuit Court was correct in holding the contract was valid with respect to the requirement of California law that it must be approved by the California Department of Finance.
3. Whether the California State Personnel Board, as a system board, rather than the Adjustment Board, has jurisdiction of plaintiffs' claims.

*These so-called "waived issues" are before the Adjustment Board in the various dockets of plaintiffs' claims (R.22), which the District Court's order, as directed by the Seventh Circuit, would require the Board to decide.

In any event, the bar of the Eleventh Amendment to the proceedings before the Adjustment Board could not be waived by the California Attorney General without statutory authorization and may be raised here (*Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 467).

REASONS FOR GRANTING THE WRIT.

A. DIRECT CONFLICT BETWEEN SEVENTH AND FIFTH CIRCUITS AND CALIFORNIA SUPREME COURT.

The decision of the Seventh Circuit that the Railway Labor Act applies to a State operated railroad (App. A, pp. 6-11) constitutes, in the language of the California Supreme Court, "an unprecedented interference [by Congress] with a state's traditional method of fixing the working conditions of its employees" (*California v. Brotherhood of Railroad Trainmen, et al.*, 37 Cal.2d 412, 232 P.2d 857, App. B, p. 30). The California decision also conflicts with that of the Fifth Circuit in *New Orleans Public Belt v. Ward*, 195 F.2d 829, upon which the Seventh Circuit relied.

No term of the Act applies to a State.

The comprehensive interpretive technique used by the California Supreme Court in concluding that Congress did not intend the States to abandon their traditional methods of fixing and enforcing working conditions for State employees by statute, for collective bargaining procedures, contrasts favorably with the cursory treatment given the problem by the Seventh and Fifth Circuits.

B. IMPORTANCE OF THE ISSUES.

1. As Congress historically has been reluctant to interfere with the established modes of fixing the terms and conditions of government employment, both State and Federal, the Seventh Circuit's discovery in the general language of section 1 of the Railway Labor Act of an intention to require the State to displace its present pro-

cedures and collectively bargain with its Belt Line employees has a potentially far-reaching impact on the administration of State government.

In *Sherman v. United States*, 282 U.S. 25, 29, this Court, speaking through Mr. Justice Holmes, said of the State Belt Railroad:

“California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor—a State prerogative.”

California's concern is for the integrity of its state-wide civil service system, established under its constitution and civil service laws, vis a vis the collective bargaining procedures of the Railway Labor Act. As the California Supreme Court has pointed out, these statutes provide a comprehensive system for the appointment, classification, promotion, salary ranges, hours and general working conditions of all members of the civil service. These statutes also provide a complete system for the “settlement of disputes and grievances of its [the State's] employees within the framework of its own government” (App. B, p. 33), whereas, under the Railway Labor Act, California is required to go before the National Railroad Adjustment Board as here, or the National Mediation Board for the settlement of disputes and grievances (45 U.S.C. §§ 153, 156). Civil service laws have provided rights and privileges for State employees which are superior to those provided by the contract involved in this case. To require California to establish working conditions for the State Belt employees by collective bargaining causes disunity and confusion in personnel management as other State employees at the

Harbor of San Francisco, working side by side with the employees of the State Belt, are members of the State civil service system.

It is difficult to believe that Congress by the general terms of the Act intended a State to establish terms of employment with its harbor railroad employees rather than by the historic method of statute and regulation. When faced with a similar question involving a claim that collective bargaining statutes in interstate commerce were applicable to the Federal government, Mr. Justice Black and Mr. Justice Douglas wrote:

"Congress had never in its history provided a program for fixing wages, hours, and working conditions of its employees by collective bargaining. Working conditions of Government employees had not been the subject of collective bargaining, ~~not~~ been settled as a result of labor disputes. It would require specific congressional language to persuade us that Congress intended to embark upon such a novel program or to treat the government employer-employee relationship as giving ~~rise~~ to a 'labor dispute' in the industrial sense." (Concurring opinion in *U.S. v. United Mine Workers*, 330 U.S. 258, 328-329.)

For Congress to require a state to establish wages and working conditions for its inter-state railroad employees by collective bargaining, and settle employee grievances and other disputes before Federal administrative agencies would appear just as "novel". Other statutes pertaining to labor relations in interstate commerce, are in pari materia with the Railway Labor Act (*National Labor Relations Board v. Jones and Laughlin etc. Corp.*, 301 U.S. 1, 44-45). Yet Congress whenever faced with the specific

question of applying collective bargaining procedures to the United States, or to the States and their subdivisions, has specifically excluded them.*

2. The decision of the circuit court presents to this court the unsettled and delicate question of the constitutional power of Congress to control a state's employer-employee relationships. As pointed out by the California Supreme Court, the Railway Labor Act would stringently control and interfere with the hitherto assumed right of California as a sovereign state to select and control the employees and agents who carry out state functions. As the Honorable Wayne Morse declared for the National War Labor Board: "It has never been suggested that the federal government has the power to regulate with respect to the wages, working hours, or conditions of employment those who are engaged in performing service for their states or their political subdivisions." (*City of Newark etc.*, 5 War Labor Reports 286, 288). At least in the delicate task of balancing the power of Congress over commerce and this fundamental right of the states there is nothing presently in the problem of a state's employer-employee relations in interstate railroad commerce which would justify this inroad upon the rights of the states.

The proposition of the Seventh Circuit that Congress under the commerce power may subject a state to collective bargaining techniques, despite their own laws fixing con-

*National Labor Relations Act of 1935, 29 U.S.C. 151, *et seq.*, 152(2); Labor Relations Act of 1947, 29 U.S.C. 141, *et seq.*, 142(3); Fair Labor Standards Act of 1938, 29 U.S.C. 201, *et seq.*, 203(a) and (d); War Labor Disputes Act; Act of June 25, 1943, c. 144, § 2(d), 57 Stat. 163, 164, expired six months after termination of hostilities of World War II, as provided by section 10 of the Act.

ditions of employment, applies not only to a state operated switching railroad but to the state operated harbors, bridges, reclamation, water, power and lighting districts and many other state enterprises, which are a part of and affect interstate commerce.*

3. Another important question is presented with respect to the State's constitutional immunity from an exercise of the federal judicial power (U.S. Const., Amdt. XI; *Hans v. Louisiana*, 134 U.S. 1; *Ford Co. v. Department of Treasury*, 323 U.S. 459, 464). The Railway Labor Act provides a system for the adjudication of disputes arising under existing contracts which rests ultimately upon an exercise of federal judicial power (45 U.S.C. § 153(1)(i)-(p)). These provisions are integral and vital elements of the Act (see *Slocum v. Delaware etc.*, 339 U.S. 239, 242-243). The mandate of the circuit court herein directs the Adjustment Board to render awards in the State Belt dockets. The findings and orders of the board are prima facie evidence of the facts stated therein (45 U.S.C.

*Port of New York Authority, created by New York and New Jersey, operates interstate bridges, vehicular tunnels, and a bus line.

Helvering v. Gerhardt, 304 U.S. 405.

City of New Orleans—port and terminal switching railroad.

Creekmore v. Pub. Belt R. Com., 134 F.2d 576.

Alabama—Port of Mobile.

8 N.L.R.B. 1297.

Albany Port Commissioners—port facilities including a railroad.

Com'r etc. v. Ten Eyck, 76 F.2d 515, 517.

Metropolitan Water District of Southern California, operating generating stations and power lines.

San Francisco and Los Angeles World Trade Center Authorities (Calif. Stats. 1947, ch. 1508, Gen.L. 9300) empowered to operate warehouses, busses, aircraft, ships, and tracks necessary for development of domestic and international trade of San Francisco Harbor and the import-export facilities of the City of Los Angeles.

These are but a few examples.

§ 153(1) (p), App. C). If the awards are favorable to the plaintiffs herein, the act authorizes them to sue California in the United States District Court for the purpose of enforcing the awards (45 U.S.C. § 153(1)(p)). The combined federal commerce and judicial power (U.S. Const. Art. I, § 8, cl. 3; Art. III) being exerted against California under the circuit court's ruling is subject, however, to the specific limitation of the Eleventh Amendment. The judicial power of the United States does not extend to actions by individuals against a state (U.S. Const., Amdt. XI), even though those actions are brought as part of the Congressional plan of regulating commerce (*Cf. Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 336; *Missouri v. Fiske*, 290 U.S. 18, 25; *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 467). The fact that California in operating the State Belt is engaged in interstate commerce (*Cf. U.S. v. California*, 297 U.S. 175) and that this operation is considered proprietary (*People v. Superior Court*, 29 Cal. 2d 754, 763, 178 P. 2d 1) does not remove the immunity granted by the Eleventh Amendment (*Murray v. Wilson Distilling Co.*, 213 U.S. 151; *State of North Dakota v. National Milling, etc. Co.*, 114 Fed. 2d 777, 779).

4. Even if the Railway Labor Act applies generally to a State, the all important and unsettled question remains: To what extent must State officers accede to the demand of the Act that they make every "reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes," * * *? (45 U.S.C. § 152(1)). In the light of the limitations placed upon them by State statutes fixing terms of employment, is the present contract valid where its provisions conflict with

California civil service laws? The California Supreme Court very clearly indicates that State officers, even if they comply with the statute by meeting for the purposes of collective bargaining, cannot, as State agents, go beyond the limitations placed upon them by California law (App. B). In the instant case, it was contended that the present contract, even if under the penumbra of the Act, was invalid because essential provisions violated State law. Heretofore, this court has said that the Act would "not fix and does not authorize any one to fix generally applicable standards for working conditions" (*Terminal RR Assn. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6). The present contract in six important particulars differs from provisions of California's civil service laws (App. G).

C. DECISIONS PERTAINING TO THE APPLICATION OF OTHER FEDERAL STATUTES TO THE STATE BELT RAILROAD ARE NOT DETERMINATIVE.

Because Federal statutes concerning safety appliances (*U.S. v. California*, 297 U.S. 175); rules of tort liability (*Maurice v. California*, 43 Cal.App.2d 275, 110 P.2d 706), and taxes (*California v. Anglim* (9th Cir.), 129 F.2d 455) have been held to apply to a State as well as private carriers, it does not follow that all Congressional assertions of the commerce power can be applied against a State. Whenever it is asserted that the general terms of a statute regulating interstate commerce are applicable to a State the particular act and its impact upon State functions must be considered. As the California Court said, those general terms will not be applied to a sovereign

state unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected (*U.S. v. United Mine Workers*, 330 U.S. 258, 272-273; *Parker v. Brown*, 317 U.S. 341, 350-351). In *U.S. v. California*, this court, in determining if the general term "any carrier" was intended to apply to a State owned and operated railroad, considered the general coverage of the act, the purposes to be achieved, the dangers to be averted, and the nation-wide application of the statute. Upon such considerations this Court held that there appeared to be no convincing reason why the protective features of the federal Safety Appliance Act (45 U.S.C. § 1) should not be applied to a State as well as to a privately owned carrier. If the Seventh Circuit had used the interpretive technique employed by this Court in *U.S. v. California*, *supra*, it would readily appear that Congress did not intend the term "carrier" to apply to a State. The purpose of the Railway Labor Act—the removal of the company union and the prevention of strikes is not generally referable to a State (*Virginian Ry. Co. v. System Federation*, 300 U.S. 515). (See *Los Angeles v. Los Angeles etc. Council*, 94 Cal.App.2d 36, 210 P.2d 305). The purpose—to afford full freedom by employees in the choice of bargaining representatives—is inapplicable to a State (*U.S. v. United Mine Workers*, 330 U.S. 258, 274, 328-329). The subject matter—the establishment of working conditions through collective bargaining—is universally recognized as being inapplicable to the government (*U.S. v. United Mine Workers*, *supra*; *California v. Brotherhood of Railroad Trainmen*, 37 Cal.2d 412, 232 P.2d 857; *Railway Mail Assn. v. Corsi*, 56 N.E. 2d (N.Y.) 721, 723). The Act does not provide for nation-wide collective bargaining contracts or conditions of work

(*Virginian Railway Co. v. System Federation*, 300 U.S. 515, 548; *Terminal RR Assn. v. Brotherhood of RR Trainmen*, 318 U.S. 1-6). Consequently, there is no necessary implication, such as was found by this Court in *U.S. v. California, supra*, that Congress must have intended that a State, in the operation of a railroad, particularly a local switching railroad, be required by federal fiat, to engage in collective bargaining.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
August 31, 1956.

Respectfully submitted,

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Assistant Attorney General of the State of California.

EDWARD M. WHITE,

Attorneys for State of California.

(Appendices Follow.)

Appendix A

In the United States Court of Appeals
for the Seventh Circuit

No. 11,573

October Term, 1955—April Session, 1956

Harry Taylor, Peter A. Calus, James
W. Brewster, William J. Langston
and H. C. Greer,

Plaintiffs-Appellants

vs.

L. B. Fee, et al.,

Defendants-Appellees,

and

State of California,

Intervening Defendant-Appellee.

} Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division.

April 23, 1956

Before Finnegan, Lindley and Schnackenberg, *Circuit Judges*.

Schnackenberg, *Circuit Judge*. This suit was brought in the district court to compel the First Division of the Na-

[NOTE: Advance citation is 233 F.2d 251.]

tional Railroad Adjustment Board to take jurisdiction of and decide five claims filed there by plaintiffs.

Among the facts found by the district court¹ are those which we now state.

On September 1, 1942, the California Board of State Harbor Commissioners,² which operates the state-owned State Belt Railroad, entered into an agreement covering rates of pay and working conditions with two railroad unions—the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen. The five plaintiffs in this action were at all material times employees of State Belt and members of one or the other of the two brotherhoods.

At various times during the period beginning September 1, 1942 and the filing of this suit on January 14, 1953, the plaintiffs were employed as trainmen, engineer and pilot for the State Belt Railroad. Between April 6, 1949 and August 13, 1951, grievances on behalf of plaintiffs were filed with the First Division of the National Railroad Adjustment Board, which never acted upon them. The Adjustment Board was created by the Railway Labor Act, 45 U. S. C. A. §151 *et seq.*, to hear and make awards in “ . . . disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ”.³ The Board, and each division

¹132 F. Supp. 356.

²Herein sometimes referred to as the “Harbor Board”.

³45 U. S. C. A., §153 First (i).

thereof, is composed of equal numbers of representatives of the carriers and of the labor organizations.

Following a decision by the California Supreme Court (*State v. Brotherhood of Railroad Trainmen*, 37 Cal. 2d 412, 232 P. 2d 857),⁴ the five carrier members of the First Division of the Adjustment Board declines to proceed, claiming that the Division was without jurisdiction due to the California court's ruling. Faced with an administrative deadlock in the Division, the plaintiffs filed suit.

The attorney general of the United States filed an answer on behalf of the First Division, in which the allegations of plaintiffs' complaint were admitted and the plaintiffs' right to the relief prayed for was also acknowledged. The five carrier members of the First Division appeared by special counsel and resisted plaintiffs' claim to the relief sought. The state of California was permitted to intervene as a defendant.

The district court granted a motion of the state for summary judgment and entered a final judgment order dismissing the plaintiffs' complaint as to all defendants, from which this appeal was taken. The errors relied on arise out of conclusions of law made by the court. There is no contested issue of fact.

The State Belt Railroad is a common carrier engaged in interstate commerce. Its lines parallel the waterfront of San Francisco Harbor and serve some 45 wharves and 175 industrial plants. It has track or freightcar ferry

⁴For brevity sometimes referred to herein as "*State v. Brotherhoods*".

connections with three interstate railroads. The State Belt Railroad is a vital link connecting various steamship terminals and adjacent industrial plants with three interstate carriers by railroad. The number of its employees varies between 125 and 225 persons, depending upon the volume of its business. *State v. Brotherhoods, supra*. In this court these facts are not disputed.

The Harbor Board operated the Railroad and applied the provisions of the collective agreement from September 1, 1942, to about November 13, 1951. The plaintiffs and the other enginemen and trainmen employees rendered services to the Harbor Board and received their pay under the September 1, 1942 agreement. During the period referred to, claims were filed by or on behalf of various employees with the National Railroad Adjustment Board, and awards were rendered on these claims.

Early in 1948 the state of California filed an action for declaratory judgment against the two brotherhoods in the Superior Court of the City and County of San Francisco. This action sought to have the September 1, 1942 agreement declared illegal, and was predicated upon two contentions: *first*, that, because the Railway Labor act does not expressly apply to state-owned railroads, the operation of the State Belt Railroad is not subject to that act and the Harbor Board is not obliged to bargain collectively with the representatives of its employees for the purpose of establishing employees' rates of pay, rules and working conditions, and *secondly*, that the collective agreement of September 1, 1942 does not conform to the requirements of California statutory laws, because the

rates of pay, which comprise article 1 of the agreement, were not submitted to the Department of Finance for its approval.

Section 1 of the statute upon which the state relies, as it existed when this contract was signed, being the act of September 15, 1935, §675.1 of Political Code of California, reads as follows:

“Unless the Legislature specifically provides otherwise, whenever any State department board, commission, court or officer fixes the salary or compensation of one employee or officer, which salary is payable out of State funds, the salary shall be subject to the approval of the State Department of Finance before it becomes effective and payable.”

In 1943 (California Laws 1943, ch. 1016, §1) slight changes in phraseology were made. They are not material here. In its present form §675.1 is known as §18004, Gov. Code of California.

The Superior Court entered judgment in favor of the defendant brotherhoods. This judgment was affirmed on appeal by the District Court of Appeal, First District, but the judgment was reversed by the California Supreme Court on June 20, 1951, 37 Cal. 2d 412; 232 P. 2d 857. Certiorari was denied by the United States Supreme Court, 342 U. S. 876.

1. The state of California takes the position that the decision of its highest court in *State v. Brotherhoods*, *supra*, determining that the Railway Labor act is not applicable to the state, and that the contract of September 1, 1942 is invalid, is *res judicata* in this case, and that the district court was correct in so holding.

It is significant that plaintiffs in this case were not parties to *State v. Brotherhoods*. But, says the state of California, plaintiffs in this action "are in privity with the Brotherhoods who represented them before the California court and now represent them before the Adjustment Board". The state does not define the capacity in which it claims the brotherhoods represented plaintiffs. Certainly the record is devoid of any evidence of an express grant of authority. If the brotherhoods had an agency to represent the plaintiffs in that case, as far as the record before us shows, it could have been derived only from (a) the provisions of the federal Railway Labor act, or (b) the bargaining agreement of September 1, 1942, or both.

(a) The Railway Labor act,⁵ in §151, defines the term "employee" as used therein, as including "every person in the service of a carrier * * * who performs any work * * *". The same section also defines the term "representative" as meaning "any person or persons, labor union, organization, * * * designated either by a carrier * * * or by its or their employees, to act for it or them."

Section 152, after placing a duty upon all carriers and employees to exert every reasonable effort to make agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, provides that all disputes between a carrier and its employees shall be considered, and, if possible, decided in conference between representatives designated and authorized so to confer, respectively, by the carrier and the employees

⁵45 U. S. C. A., §151, *et seq.*

thereof interested in the dispute. It further provides that representatives, "*for the purposes of this chapter*, shall be designated by the respective parties * * *." It also stipulates that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and that in case of a dispute arising out of grievances, the designated representatives of the carrier and such employees, shall confer in respect to such dispute.

Section 153(i) provides that disputes growing out of grievances may be referred *by either party* to the appropriate division of the Adjustment Board. Section 153(j) states that the parties may be heard either *in person*, by counsel, or by other representatives, as they may respectively elect.

(b) We have examined the excerpts from the agreement of September 1, 1942 appearing in the record, and we find no authorization therein empowering the brotherhoods to represent individual members in any court whatsoever, and counsel has not directed our attention to any part of the contract granting such authority. The record is silent as to this aspect of the case. Moreover, there is nothing in the record to indicate that the brotherhoods purported to act in the state courts on behalf of the plaintiffs or any other employees.

We conclude that, insofar as plaintiffs' individual rights in asserting grievances before the National Railroad Adjustment Board and otherwise, are concerned, neither the

⁶Italics supplied by us;

Railway Labor act nor the contract authorized the brotherhoods to represent plaintiffs in the state court action. The rights of plaintiffs to work under the contract were valuable personal rights which could not be affected or destroyed by a court decision in an action to which they were not parties and in which they did not appear either personally or by a duly authorized representative. While the brotherhoods were authorized by the Railway Labor act to bargain for and execute the agreement of September 1, 1942 on behalf of the State Belt Railroad employees, including plaintiffs, and were also authorized to submit plaintiffs' grievance disputes to the National Railroad Adjustment Board (if plaintiffs so elected), all as provided in the act, their authority did not extend into the distinctly different field of representing plaintiffs in a court action where their individual rights as employees, under the contract, were being attacked.

It is clear from the reading of the act that the rights of employees are personal to them and distinct from the rights of the brotherhood and its members. This is recognized by the statutory provisions above cited to the effect that an employee's dispute may be *by him* referred to the Adjustment Board and that he may appear there *in person*, or by counsel or other representative, *as he may elect*. We are not here concerned with the rights which the brotherhoods themselves gained by the execution of the contract. We are concerned with the rights which the employees of State Belt Railroad obtained by the execution of that contract.

We, therefore, conclude that the holding in *State v. Brotherhoods* is not *res judicata* here as against plaintiffs.

2. Untrammelled by the doctrine of *res judicata* and it being conceded that the State Belt Railroad is a common carrier engaged in interstate commerce, we hold that the congress has power to regulate it, pursuant to Art. 1, §8, of the United States constitution, which provides:

“The Congress shall have Power * * * To regulate Commerce * * * among the several States, * * *.”

Pursuant thereto, congress enacted the Railway Labor act,⁷ the terms of which, it is contended by plaintiffs, apply to the State Belt Railroad although it is owned by a state.

When used in the Railway Labor act, the term “carrier” “includes any * * * carrier by railroad, subject to the Interstate Commerce Act, * * *.”⁸ The Interstate Commerce act⁹ provides that it “shall apply to common carriers engaged in * * * the transportation of passengers or property wholly by railroad * * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia * * *.”

A railroad which lies wholly within one state is subject to the Interstate Commerce act if it participates in the movement of persons and property from one state to another, *United States v. Union Stock Yard*, 226 U. S. 286, *Dearing v. United States*, 167 F. 2d 310.

Whether the railroad is owned by a corporation or a political entity is not a part of the test of whether it is

⁷U. S. C. A., §151, *et seq.*

⁸45 U. S. C. A., §151, First.

⁹49 U. S. C. A., §1.

subject to the act. A functional test only is provided by the act. In *City of New Orleans v. Texas & Pac. Ry. Co.*, 195 F. 2d 887, at 889, the court said:

“The Public Belt is a railroad, though owned by the City. So long as it engages in interstate and foreign commerce it is subject to the federal law and the Interstate Commerce Commission, like any other railroad.”

In *New Orleans' Public Belt R. Com'n v. Ward*, 195 F. 2d 829, the court, in considering the application of the Railway Labor act to the Public Belt Railroad, expressly rejected the decision of the California Supreme Court in *State v. Brotherhoods*, *supra*, saying at 831:

“We do not think that the decision of the California Supreme Court on the coverage of the Railway Labor Act, 45 U. S. C. A., § 151 *et seq.*, is consistent with one of the main designs of that act ‘to avoid any interruption to commerce or to the operation of any carrier engaged therein’ by requiring resort to the procedures it provides in the event of disputes ‘before they reach acute stages that might be provocative of strikes,’ *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 242, 70 S. Ct. 577, 579, 94 L. Ed. 795. Nor does that decision accord full recognition to the broad definition of the term ‘carrier’ in the Railway Labor Act.”

We said, in *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen*, 229 F. 2d 926, at 932, that the Railway Labor act, as amended in 1934, “is directed to the needs of the railroad industry, employers and employees alike, having in mind the paramount interest of the public.”

Sec. 1 of the Railway Labor act¹⁰ defines the term "carrier", as used in that act, in such broad terms as to include a railroad engaged in interstate commerce and owned by a state. The act contains no language exempting a state-owned railroad. In *United States v. State of California*, 297 U. S. 175, the State Belt Railroad was held to be subject to the federal Safety Appliance act.¹¹ In *Maurice v. State of California*, 43 Cal. App. 2d 270, 110 P. 2d 706, the same railroad was held to be subject to the federal Employers' Liability act¹² and in *State of California v. Anglim*, 129 F. 2d 455, it was held to be subject to the federal Carriers Taxing act.¹³

We, therefore, conclude that the Railway Labor act is applicable to the State Belt Railroad in this case.

3. By the same reasoning as set forth in point one hereof, we conclude that the concession made by the brotherhoods in *State v. Brotherhoods, supra*, to the effect that the contract which resulted from collective bargaining between the brotherhoods and the Harbor Board "has never been approved by the Department of Finance,"¹⁴ is not binding upon the plaintiffs in this suit. There the California court had no occasion to, and did not, consider whether there had been an approval. Here that question is open for consideration.

Does this record show that the Department of Finance approved the contract of September 1, 1942? In determin-

¹⁰45 U. S. C. A., §151.

¹¹45 U. S. C. A., §1, *et seq.*

¹²45 U. S. C. A., §51, *et seq.*

¹³45 U. S. C. A., §261, *et seq.*

¹⁴232 P. 2d 857, at 859.

ing that question we are bound by the law of California, which is the common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of California. *People v. Statley*, 91 Cal. App. 2d 943; 206 P. 2d 76, at 78, citing §4468, Political Code of California. To the same effect are *Victory Oil Co. v. Hancock Oil Co.*, 125 Cal. App. 2d 314; 270 P. 2d 604, at 609, citing decisions of the California Supreme Court, in *In re Elizalde's Estate*, 182 Cal. 427, 432; 188 P. 560 and *Estate of Apple*, 66 Cal. 432, 434; 6 P. 7. If the constitution, statutes and court decisions of California furnish no rule by which to determine the question before us, we are required to determine it by resort, in that effort, to any authoritative court decisions enunciating the common law of England in this respect. Before doing so, however, we point out the following material facts appearing in the record before us.

Early in 1942 the Harbor Board and representatives of the two brotherhoods entered into collective bargaining, which culminated in an agreement, effective September 1, 1942, establishing rates of pay for plaintiffs and other persons similarly employed by the Harbor Board, and which also established rules of employment and working conditions for these employees. The Board operated the State Belt Railroad and applied the provisions of said agreement from September 1, 1942 and until on and after November 13, 1951,¹⁵ during which time plaintiffs and other enginemen and trainmen employees rendered service to the

¹⁵ This is the date when the United States Supreme Court denied certiorari in *State v. Brotherhoods*.

Harbor Board and received their pay under said agreement. During that period, claims were filed by or on behalf of employees of the Harbor Board with the Adjustment Board and awards were rendered thereon.

The powers and duties of the Department of Finance are specified in California Governmental act, §13290 *et seq.* Significant provisions thereof are (§13294) that it "*shall examine and expert the books of the several State agencies, at least once in each year, and as often as the director deems necessary.*"; (§13291) "*may require from all such agencies of the State financial and statistical reports, duly verified, covering the period of each fiscal year.*"; and (§13293) "*may examine all recbrds, files, documents, accounts and all financial affairs of every agency mentioned in Section 13290.*"

The Harbor Board is a state agency of California. Its operation of the State Belt Railroad along the docks of one of the busiest and largest maritime ports in the world was as open and notorious as any business operation could possibly be. It was in, or at the doors of, the great city of San Francisco. The officials and employees constituting the Department of Finance of California necesarily were informed of and knew of its operation. They were bound to know that it belonged to the state of California. They were assumed to possess average intelligence and, therefore, to know that the enginemen and other employees engaged in operating that railroad were being paid by the Harbor Board which controlled and managed it. Those operating the Department of Finance had a statutory duty to examine the books of the Harbor Board at least once in each year, and had the right to examine all of its rec-

ords, files, documents, accounts and all financial affairs, as well as the right to require from the Harbor Board financial and statistical reports, covering the period of each fiscal year.

Not only did the state pay the salaries provided for by the contract in question for a long period of time, but the plaintiffs and others were thereby induced to render the services required of them and, in order to lay an apparently legal basis for seniority rights, refrained from leaving the employment of the Harbor Board.

The foregoing undisputed circumstances support either of two conclusions. The first is that there was actually an approval of this contract contemporaneously with its execution in 1942 and that the subsequent events prove that fact. The second conclusion is that, even if there was no contemporaneous approval by the department, there was actually, from time to time as salaries were paid from state moneys, tacit approval of the contract under which they were paid.

It should be noted that §18004 speaks of an approval by the State Department of Finance, but it does not state what form the approval must take.¹⁶ However, we find

¹⁶In its brief in this court, the State of California sets forth in an appendix the majority opinion and dissenting opinion in *State v. Brotherhoods*, 232 P. 2d 857. In dissenting, Justice Carter said that the majority opinion sets forth "the additional ground for invalidating the contract that it was not approved by the Department of Finance of the State. • • •" He held that "There has been a substantial, although informal, approval by the state of the contract. It has been in force since 1942, and wages have been paid according to the rates provided for therein since that time. The Department of Finance knew of such payments and gave implicit approval of them. • • •"

from the recent case of *Treu v. Kirkwood*, 42 Cal. 2d 602, 268 P. 2d 482, at 487 (1954), that the California Supreme Court, in construing this statute, has indicated that a tacit approval by the department may reasonably be inferred from circumstances. Not finding any other determination in the decisions of California as to the common law applicable to this situation, we turn elsewhere.

The United States Supreme Court in *Bank of America v. Dandridge*, 25 U. S. (12 Wheat.) 64, 6 L. Ed. 552, enunciated the principles of the common law which we find applicable here. That was a suit brought by the bank on the official bond of its cashier. It became necessary for the bank to prove that its board of directors had approved the bond. Justice Story pointed out that it was conceded that no record of the approval of the bond existed. Applying the common law, he pointed out (6 L. Ed. 558) that the charter of the bank did not, in terms, require that such an approval should be by writing or entered of record. At 559, he said:

“There may be, and undoubtedly there is, some convenience in the preservation of minutes of proceedings by agents; but their subsequent acts are often just as irresistible proof of the existence of prior dependent acts and votes, as if minutes were produced. If a board of directors were created to erect a bridge, or make a canal or turnpike, and they proceeded to do the service, and under their superintendence there were persons employed who executed the work, and the board proceeded to pay them therefor out of funds in their hands, these facts of public notoriety would be as irresistible evidence of the due execution of their authority, and of due contracts made, and proceedings had by the board, as if the proceedings

were recorded in the most formal and regular manner.

* * * A board may accept a contract, or approve a security by vote, or by a tacit and implied assent. The vote or assent may be more difficult of proof by parol evidence than if it were reduced to writing. But surely this is not a sufficient reason for declaring that the vote or assent is inoperative. * * * All that the bank is interested in, is that there shall be an approval; and it matters not whether the fact is established by a direct record, or by acts of the directors, which recognize its prior existence."

Thus, in the case at bar the events, subsequent to the execution of the contract, including the payment of salaries periodically for several years by the Harbor Board to plaintiffs and other employees covered by that contract, openly and notoriously occurring under the supervisory eye of the Department of Finance, whose duty it was to scrutinize all of the fiscal operations of the Harbor Board, are convincing proof that it had approved the contract contemporaneously with its execution. Any other deduction from these undisputed facts would lead to a conclusion that that department had been guilty of an unprecedented and prolonged dereliction of duty or an abdication of the very functions for which it existed. In the absence of any evidence that the Department of Finance disapproved the contract, the evidence before us requires us to hold that the approval of the department, as required by §18004, was given when the contract was executed.

Secondly, the same facts as hereinbefore set forth sustain the conclusion, which we also reach, that the payment of salaries from time to time over a period of several years, under the supervision of the Department of Fi-

nance, constituted its tacit, effective, legal approval of the contract in question.

While not necessary for the conclusions which we have just reached, we point out the inequity of any court at this time declaring the contract void to the detriment of the seniority rights of plaintiffs based upon service rendered by them under said contract. This case was brought in a court of equity and such result would be abhorrent to equitable principles.

Under the heading "Position of State of California on other issues", the state contends *inter alia* that, if the contract is valid and may be enforced, the authority of the Adjustment Board to decide the instant claims is precluded by the provision in the contract that a system board—the State Personnel Board—shall hear and decide these claims (citing 45 U. S. C. A., §153—Second). In its brief herein the state makes no further reference to this contention ignoring it in its "summary of argument", "propositions of law relied on and citations of authorities" and in the body of its argument. (See rule 16 of this court referring to the contents of briefs.) No reference thereto was made in oral argument before this court. Under these circumstances we treat this contention as waived. For the same reason we consider as waived in this court the contentions of the state set forth in the footnote.¹⁷

17 • • • (c) If the Railway Labor Act is held to be applicable to the State of California, then the Act is an unconstitutional interference with a state's relationship with its employees. (d) The contract is also invalid because the Harbor Board lacked authority to negotiate terms of the contract in conflict with the State Constitution and civil service laws. • • • (f) If, nevertheless, the Adjustment Board does have jurisdiction over these claims the Board should not be required to render awards because such awards could

Accordingly, the judgment order of the district court is reversed and this cause is remanded to that court with instructions to enter a decree granting to plaintiffs the relief for which they specifically pray in their complaint.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

not be enforced against the State of California in the Federal courts as the Railway Labor Act provides, because of the inhibition of the Eleventh Amendment of the United States Constitution."

JUDGMENT

United States Court of Appeals
for the Seventh Circuit

Chicago 10, Illinois

Monday, April 23, 1956

Before

Hon. Philip J. Finnegan, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

No. 11,573

Harry Taylor, Peter A. Calus, James
W. Brewster, William J. Langston
and H. C. Greer,

Plaintiffs-Appellants,

vs.

L. B. Fee, et al.,

Defendants-Appellees,

and

State of California,

Intervening Defendant-Appellee.

Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division,

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, **REVERSED** with costs; and that this cause be and the same is hereby **REMANDED** to the said District Court with instructions to enter a Decree granting to plaintiffs the relief for which they specifically pray in their complaint, in accordance with the opinion of this Court filed this day.

DENIAL OF REHEARING

United States Court of Appeals
for the Seventh Circuit

Chicago 10, Illinois

Thursday, June 7, 1956

Before

Hon. Philip J. Finnegan, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

No. 11,573

Harry Taylor, et al.,

Plaintiffs-Appellants,

.vs.

L. B. Fee, et al.,

Defendants-Appellees,

and

State of California,

Intervening Defendant-Appellee.

Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division.

It is ordered by the Court that the petition for a rehearing filed by the State of California be, and the same is hereby, DENIED.

Appendix B

Conflicting Decision.

In the Supreme Court of the State of California,

IN BANK

S. F. No. 18003

State of California,

Plaintiff and Appellant,

vs.

Brotherhood of Railroad Trainmen, an Un-
incorporated Association, and Brotherhood
of Locomotive Firemen and Enginemen,
an Unincorporated Association,

Defendants and Respondents,

David T. Lock,

Intervenor and Appellant.

June 20, 1951

As modified on denial of rehearing on June 19, 1951 as
reported in 232 P.2d 857 (37 Cal. 2d 412)

GIBSON, Chief Justice.

The State of California brought this action for declaratory relief to determine the validity of a contract entered into by respondent brotherhoods and the Board of State Harbor Commissioners respecting the rates of pay and

working conditions of employees of the State Belt Railroad. This appeal was taken from a judgment in favor of respondents declaring the contract valid.

The Belt Railroad is owned and operated by the state, and its management and control is committed by statute to the Board of State Harbor Commissioners. Harb. & Nav. Code §§ 3150-3165. The railroad parallels the waterfront of San Francisco harbor, extending to some 45 wharves and directly serving approximately 175 industrial plants, and it has track or freight-car ferry connections with three interstate railways. The Belt line facilitates the freight traffic of the harbor by moving freight cars between the various steamship companies, industrial plants and railroad carriers with which it has connections, and it serves as a link in the through transportation of interstate freight shipped to or from points in San Francisco over the connecting carriers. It is settled that the Belt Railroad is engaged in interstate commerce. *United States v. State of California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567; *State of California v. Anglim*, 9 Cir., 129 F.2d 455; *Maurice v. State of California*, 43 Cal.App.2d 270, 110 P.2d 706.

The railroad employs between 125 and 225 persons, the number depending upon the volume of business. The Constitution of California provides that these employees are members of the state civil service, and under the Civil Service Act the appointment, classification, promotion, salary ranges, hours and general working conditions of all members of the civil service are governed by provisions of that act and by regulations of the State Personnel Board. Calif.Const. art. XXIV, § 4; Govt.Code §§

18500-19765. Compensation of employees within the ranges set by the State Personnel Board may be fixed by the Harbor Board, Harb. & Nav. Code, § 1705, subject to approval by the state Department of Finance. Gov. Code, § 18004.

On September 1, 1942, the Board of State Harbor Commissioners and respondent brotherhoods, representing the railroad employees, entered into the contract here involved. In general, the contract fixes matters relating to pay and working conditions which are normally governed by civil service statutes and regulations, and certain of its provisions conflict in substance with civil service laws on the subjects of promotions, lay-offs, leaves of absence, accumulation of sick leave and procedures for dismissal, demotion and suspension. The contract was the result of collective bargaining between respondent brotherhoods and the Harbor Board, and the parties concede that it has never been approved by the Department of Finance.

The state contends that the contract is invalid because the employees affected are members of the state civil service and that their pay and working conditions are to be governed exclusively by legislation or administrative rules and not by collective bargaining contract. A similar contention is made by the intervenor, a Belt Railroad employee, who claims that his benefits and privileges are less under the provisions of the contract than under the state Civil Service Act, and that he is entitled to protection of the laws governing state employment. It is respondents' position, however, that the state, as owner of the Belt Railroad, is subject to the federal Railway Labor Act which secures to employees of railroads engaged in

interstate commerce the right to enter into collective bargaining agreements with their employer concerning rates of pay, rules and working conditions. 45 U.S.C.A. §§ 151, 152. Accordingly, respondents argue, the contract is valid and supersedes all provisions of the state Constitution, the Civil Service Act, and rules and regulations of the State Personnel Board which are inconsistent therewith.

The Railway Labor Act requires all common carriers by railroad, their officers, agents, and employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether rising out of the application of such agreements or otherwise, in order to avoid any interruptions to commerce * * *." 45 U.S.C.A. § 152. It provides that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and it sets up a procedure for the settlement of disputes by conference of representatives of employer and employees and, failing solution there, by reference to the National Railroad Adjustment Board, the National Mediation Board, or arbitration. 45 U.S.C.A. §§ 152-155, 157. Orders of the National Railroad Adjustment Board may be enforced by action in United States District Courts, and judgment may be entered on awards which are the result of arbitration. 45 U.S.C.A. §§ 153 subd. 1(p), 159. The act fixes the procedure employers must follow in changing rates of pay, rules or working conditions, requiring thirty days' notice and conference with employee representatives; it further provides that no such changes shall be effective until final action by the National Mediation Board, if the board offers its services or either

party requests them. 45 U.S.C.A. § 156. Punishment in the form of fines and imprisonment is prescribed for employers who fail to obey provisions of the act. 45 U.S.C.A. § 152, tenth.

The Railway Labor Act does not expressly apply to state-owned railroads, 45 U.S.C.A. § 151, and it is well settled that statutes which in general terms divest pre-existing rights or privileges will not be applied to a sovereign, in the absence of express words to that effect, unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected. *United States v. United Mine Workers*, 330 U.S. 258, 272-273, 67 S.Ct. 677, 686, 706, 91 L.Ed. 884; *United States v. Wittek*, 337 U.S. 346, 359, 69 S.Ct. 1108, 1115, 93 L.Ed. 1406; *Parker v. Brown*, 317 U.S. 341, 350-351, 63 S.Ct. 307, 313, 87 L.Ed. 315; *Balthasar v. Pacific Elec. R. Co.*, 187 Cal. 302, 305-306, 202 P. 37, 19 A.L.R. 452; cf. *United States v. State of California*, 297 U.S. 175, 186, 56 S.Ct. 421, 425, 80 L.Ed. 567. In *United States v. State of California*, supra, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567, which also involved the Belt Railroad; the Supreme Court found reasons for believing that Congress intended to include states within the operation of the federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq. The court stated that the purpose of the statute there involved was to protect employees, the public and commerce from injury because of defective appliances on interstate carriers and that no convincing reason had been advanced why it should not apply to all carriers, whether private or state owned. The Belt Railroad has also been held subject to the Federal Employers' Liability Act, 45 U.S.C.A. § 51

et seq. and the federal Carriers Taxing Act, 45 U.S.C.A. § 261 et seq. *Maurice v. State of California*, 43 Cal.App. 2d 270, 110 P.2d 706; *State of California v. Anglim*, 9 Cir., 129 F.2d 455. However, considerations which may justify the application of general safety and taxing measures to state-owned carriers are not controlling in determining the intended scope of a statute which purports to regulate and supervise employer-employee relationships. We must look to the subject matter of a particular statute and to the terms of the enactment in its total environment in order to determine legislative intent, and there are, we believe, affirmative reasons which indicate that Congress did not intend the Railway Labor Act to apply to state-owned carriers.

It is most significant that, while one of the major purposes of the Railway Labor Act is to secure the right of employees to bargain collectively with their employer with respect to rates of pay, rules and working conditions, the terms and conditions of government employment are traditionally fixed by legislation and administrative regulation, not by contract. See *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 95, 65 S.Ct. 1483, 1488, 89 L.Ed. 2072; *Nutter v. City of Santa Monica*, 74 Cal.App.2d 292, 298, 168 P.2d 741; *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W. 2d 539, 542-544. A concise statement of the characteristics distinguishing public from private employment in this regard appears in a letter from President Roosevelt to the National Federation of Federal Employees, dated August 16, 1937: "All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It

has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters." Quoted in *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539, 542-543; *C. I. O. v. City of Dallas*, Tex.Civ.App. 198 S.W. 2d 143, 144-145.

Recent authorities hold uniformly that the wages, hours and working conditions of government employees must be fixed by statute or ordinance and that state laws which, in general terms, secure the right of employees to enter into collective bargaining agreements with respect to those matters are not intended to apply to public employment.¹ *Nutter v. City of Santa Monica*, 74 Cal.App.2d 292, 168 P.2d 741; *City of Springfield v. Clouse*, 356 Mo. 1239, 206

¹It should be noted that we are not here concerned with the right of public employees to join or form labor organizations or to urge the proper exercise of discretionary authority by executive and administrative officers. See *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539, 542-543; *City of Los Angeles v. Los Angeles etc. Council*, 94 Cal.App.2d 36, 45, 210 P.2d 305; 1 *Teller, Labor Disputes and Collective Bargaining* [1940 ed., 1947 Supp.] § 171, pp. 113-119; *Rhyne, Labor Unions and Municipal Employee Law* [1946 ed.] § 1, pp. 21-33; *Rhyne, id.*, Supp.Rep. [1949] § 1, p. 8-15; 54 *Harvard Law Rev.* 1360 [1941]; cf. *C. I. O. v. City of Dallas*, Tex.Civ.App., 198 S.W.2d 143, 145-147; *Seattle High School Chap. No. 200 v. Sharples*, 159 Wash. 424, 293 P. 994, 72 A.L.R. 1215.

S.W.2d 539, 545; *Miami Water Works Local No. 654 v. City of Miami*, 157 Fla. 445, 26 So.2d 194, 195, 165 A.L.R. 967; see *Mugford v. Mayor and City Council of Baltimore*, 185 Md. 266, 44 A.2d 745, 746-747, 162 A.L.R. 1101; *Hagerman v. City of Dayton*, 147 Ohio St. 313, 71 N.E.2d 246, 253, 254, 170 A.L.R. 199; 1. Teller, *Labor Disputes and Collective Bargaining* [1940 ed., 1947 Supp.], § 171. The Labor Relations Acts of several states expressly exclude public employees from their provisions relating to collective bargaining,² and it has been held that such discrimination does not constitute a violation of equal protection. *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 95, 65 S.Ct. 1483, 1488, 89 L.Ed. 2072.

Congress itself has consistently excluded state employment from the operation of other labor relations statutes enacted under the commerce or war power. The National Labor Relations Act of 1935 and the subsequent Labor Management Relations Act of 1947 which secure the right of collective bargaining to employees of employers engaged in interstate commerce, expressly provide that the term employer as used in the acts does not include the United States or any state or political subdivision. 29 U.S.C.A. §§ 141 et seq., 152(2). The Fair Labor Standards Act of 1938 likewise expressly excludes governmental employers from its provisions, 29 U.S.C.A. §§ 201, 203(d), as does the War Labor Disputes Act of 1943. 50 U.S.C.A. §§ 1501, 1502(d). These statutes indicate a uniform con-

²Fla.Stat. Ann. ch. 453, § 453.17; Mass. Ann. Laws, Ch. 150B, § 2; Minn. Stat. Ann. Ch. 179, § 179.01, subd. 3; N.Y. Labor Law, McKinney's Consol. Laws, Ch. 31, art. 20, § 715; Penn. Stat. Ann. Title 43, § 211.3; R.I. Laws 1941, Ch. 1066, § 16; Tex. 15 Civ. St. Art. 5154c; Utah Code Ann. 1943, 49-1-10(2); Wis. Stats. 1939, c. 57.

gressional policy that the relationship between a state and its employees is not to be controlled by the federal government even where those employees are engaged in interstate commerce; and so closely related in purpose is such labor legislation with the Railway Labor Act that the Supreme Court has characterized collective bargaining provisions of the Railway Act as the "analogue" of similar provisions in the National Labor Relations Act and has given parallel interpretation to sections of the two acts. *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U.S. 1, 44-45, 57 S.Ct. 615, 627-628, 81 L.Ed. 893.

Under all the circumstances, it is obvious that application of the collective bargaining requirements of the Railway Labor Act to state employment would constitute an unprecedented interference with a state's traditional method of fixing the working conditions of its employees, and it seems doubtful that Congress had such an intent. As stated in *Parker v. Brown*, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

The legislative history of the act gives no indication that it was intended to affect any but private carriers. Prior to its enactment in 1926, Congress had passed a series of laws designed to bring about peaceful settlement of railroad disputes, but none had the full support of both the carriers and their employees, and arbitration machin-

ery set up under provisions of the 1920 Transportation Act, 49 U.S.C.A. § 1 et seq., had proven particularly ineffective. See 67 Cong.Rec. 4509-4513, 4516; *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 542, 57 S.Ct. 592, 597, 81 L.Ed. 789; *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U.S. 548, 562-563, 50 S.Ct. 427, 431, 74 L.Ed. 1034. In 1925 representatives of some 58 major private railroads and 20 labor organizations met and entered into prolonged negotiations over legislation which would be satisfactory to all interests, and the Railway Labor Bill was the product of these conferences. See 67 Cong.Rec. 4504-4505, 4522-4524, 4583, 4652, 8807; *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, supra, 281 U.S. 548, 563, 50 S.Ct. 427, 431, 74 L.Ed. 1034. Identical bills embodying the proposals of the unions and the railroads were introduced in each House of Congress by the chairman of its committee on interstate commerce, and, after public hearings, the Railway Labor Bill was passed without substantial amendment. (See 67 Cong.Rec. 4504-4505; Chamberlain, *The Railway Labor Act* (1926) 12 A.B.A. Jour. 633.) Thus the Railway Labor Act basically represented the agreement of labor organizations with private carriers. We have been cited to no instance in the course of passage of the bill, and have discovered none, in which the question was raised as to whether state-owned railroads were intended to be affected.

Many of the purposes stated in the Railway Labor Act are similar to some of the purposes of the Norris-La Guardia Act, 29 U.S.C.A. § 101 et seq., which were discussed in *United States v. United Mine Workers*, 330 U.S.

258, 274, 67 S.Ct. 677, 687, 91 L.Ed. 884. It was there held that the United States as an employer was not intended to be affected by statutes limiting the use of injunctions in labor disputes, and the opinion of the court, delivered by Chief Justice Vinson, states, "The purpose of the [Norris-LaGuardia] Act is said to be to contribute to the workers' full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives * * * for the purpose of collective bargaining * * *." The court then observed, "These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees." In a separate concurring opinion Justices Black and Douglas added the following, "Congress had never in its history provided a program for fixing wages, hours, and working conditions of its employees by collective bargaining. Working conditions of Government employees had not been the subject of collective bargaining, nor been settled as a result of labor disputes. It would require specific congressional language to persuade us that Congress intended to embark upon such a novel program or to treat the Government employer-employee relationship as giving rise to a 'labor dispute' in the industrial sense." 330 U.S. at page 328-329, 67 S.Ct. at page 713, 91 L.Ed. 884.

Those provisions of the Railway Labor Act which fix a method for the settlement of disputes by conference of employer and employee representatives, and, thereafter, by

reference to federal adjustment or mediation boards or to arbitration, are equally inappropriate to the relationship between a state and its employees. Normally, a state provides methods for the settlement of disputes and grievances of its employees within the framework of its own government,³ and a general Congressional provision for the handling of disputes between employers and employees would, we think, be intended to apply only to private individuals or corporations, and not to a sovereign state.

We can find no legitimate reason for making any distinction in the present case between governmental and proprietary functions of the state. The fact that operation of the Belt Railroad may be described as a proprietary activity (see *People v. Superior Court*, 29 Cal.2d 754, 763, 178 P.2d 1) is immaterial in considering the characteristics of public employment or the intended scope of congressional legislation regulating interstate commerce. *United States v. State of California*, 297 U.S. 175, 183, 56 S.Ct. 421, 424, 80 L.Ed. 567; *City of Los Angeles v. Los Angeles etc. Council*, 94 Cal.App.2d 36, 45-46, 210 P.2d 305; *Nutter v. City of Santa Monica*, 74 Cal.App.2d 292, 302, 168 P.2d 741; see *Rhyne, Labor Unions and Municipal Employee Law* [1946 ed.] § 7, p. 53-56; *Rhyne, id.*, Supp. Rep. [1949] § 7, p. 31-32; 1 *Teller, Labor Disputes and Collective Bargaining* [1940 ed., 1947 Supp.] § 171, pp. 117, 118.

³The California Civil Service Act provides for investigations or hearings by the State Personnel Board of disputes and other matters arising under the Civil Service Act and administrative rules. Govt. Code §§ 18670-18681, 18714, 18803, 18851, 19578-19587, 19541, 19576, 19583.5.

In view of our conclusion that Congress did not intend the Railway Labor Act to apply to state owned and operated carriers, we need not consider whether Congress could constitutionally undertake to regulate the relationship between a state and its employees, and we likewise need not determine whether application to a state of provisions for enforcement of orders of the Railroad Adjustment Board and arbitration awards in federal courts would constitute a violation of the Eleventh Amendment to the federal Constitution.

The judgment in the present case must be reversed for the further reason that, assuming the state is subject to the Railway Labor Act and that state civil service regulations are superseded by provisions of that act, the Harbor Board could not properly enter into the contract with the brotherhoods and bind the state without the approval of the Department of Finance, as required by section 18004 of the Government Code.⁴ There is no inconsistency between section 18004 and the provision in section 1705 of the Harbors and Navigation Code authorizing the Board of State Harbor Commissioners to fix the salary of its employees.⁵ The Department of Finance is given general

⁴Section 18004 provides: "Unless the Legislature specifically provides that approval of the Department of Finance is not required, whenever any State agency or court fixes the salary or compensation of an employee or officer, which salary is payable in whole or in part out of State funds, the salary is subject to the approval of the Department of Finance before it becomes effective and payable." As added in 1945, based on former Pol. Code § 675.1.

⁵Section 1705 provides, "• • • The board shall fix the compensation of its officers and employees other than the commissioners. • • •". As amended in 1945. Prior to 1945 the section read as follows: "• • • The salaries of [certain specified officers] shall be fixed by the board, with the approval of the Director of Finance. The board shall fix the compensation of other employees. • • •".

powers of supervision over all matters concerning the financial and business policies of the State. Govt.Code § 13070, based on former Pol.Code § 654. The purpose of such legislation is to conserve the financial interests of the state, to prevent improvidence, and to control the expenditure of state money by any of the several departments of the state. *Ireland v. Riley*, 11 Cal.App.2d 70, 72, 52 P.2d 1021. Since sections 18004 and 1705 may be harmonized, they should be construed together and with reference to the whole system of which they form a part. See *Cohn v. Isensee*, 45 Cal.App. 531, 536-537, 188 P.279; *Ireland v. Riley*, supra, 11 Cal. App.2d 70, 74-76, 52 P.2d 102; *Chilson v. Jerome*, 102 Cal.App. 635, 641, 283 P. 862. Moreover, even if we were to accept the argument that the requirement of approval of salaries by the Department of Finance is tantamount to transferring to the department the power to "fix" compensation of Harbor Board employees, the legislative intent to create supervisory powers in the Department is so clear and unmistakable that section 18004 must be regarded as modifying all earlier legislation authorizing specific state agencies to fix the salaries of their employees.

The judgment is reversed.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and
SPENCE, J.J., concur.

CARTER, Justice (dissenting).

I dissent.

The majority opinion holds that employees of the state engaged in the operation of the State Belt Railroad, a

state operated carrier engaged in interstate commerce, do not have the protection afforded by federal Railway Labor Act. 45 U.S.C.A. §§ 151-152. Under that act working conditions and rates of pay are fixed by a collective bargaining agreement between the employer and the union representing the employees. The majority holds that it was not intended by Congress to include the state as a carrier-employer; that the employees are subject to the state civil service laws, and that the Board of Harbor Commissioners are authorized to fix the salary of such employees with the approval of the Director of Finance. That result is reached on the following bases: (1) The rule of statutory construction that a statute does not apply to the government unless it is named; (2) The rates of pay and working conditions of public employees are traditionally fixed by statute and administrative regulation and must be so established; Congress has "consistently" excluded the state from labor laws; (4) The history of the act. None of those grounds is valid and the conclusion is squarely contrary to the previous determination on the subject.

In *United States v. State of California*, 297 U.S. 175, 56 S.Ct. 421, 423, 80 L.Ed. 421, the *same* Belt Railroad was involved and the court was concerned with the federal Safety Appliance Act. 45 U.S.C.A. § 1 et seq. That act has to do with standards of safety in train equipment. The particular problem presented was whether California was subject to the *penal* provision of the act for failing to comply with the safety standard. The court held that it was, and in so holding, stated principles which make it a binding precedent in the instant case. It found that the Belt Line is engaged in interstate commerce. A unanimous court said:

"The state urges that it is not subject to the Federal Safety Appliance Act. * * * it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, * * * it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal act. In any case *it is argued that the statute is not to be construed as applying to the state acting in that capacity.*

"* * * The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. *The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.* * * *

"California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, * * * and to *safe-guard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate.* * * *

"In [State of] Ohio v. Helvering, supra [292 U.S. 360, 54 S. Ct. 725, 78 L.Ed. 1307], it was held that a state, upon

engaging in the business, became subject to a federal statute imposing a tax on those dealing in intoxicating liquors, although states were not specifically mentioned in the statute. The same conclusion was reached in [State of] South Carolina v. United States, supra [199 U.S. 437, 26 S. Ct. 110, 50 L.Ed. 261]; and see Helvering v. Powers, supra [293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291]. Similarly the Interstate Commerce Commission has regarded this and other state-owned interstate rail carriers as subject to its jurisdiction, although the Interstate Commerce Act [49 U.S.C.A. § 1 et seq.] does not in terms apply to state-owned rail carriers. * * *

“Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, * * * The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. * * * *We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial. It was disregarded in [State of] Ohio v. Helvering, supra, and [State of] South Carolina v. United States, supra. See Heiner v. Colonial Trust Co., 275 U.S. 232, 234, 235, 48 S.Ct. 65, 72 L.Ed. 256.*” (Italics added.)

The foregoing is precisely pertinent in the instant case. The purpose of the Railway Labor Act, like the Safety Appliance Act, is to safeguard commerce from obstruction. 45 U.S.C.A. § 151a; *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795. The purpose being the same the application of the acts should be the same. To achieve that purpose Congress has provided means of assuring peaceable labor relations which are clearly applicable when the state is a carrier. It has declared the policy that the purpose may be attained by collective bargaining and the mediation board rather than the State Personnel Board. If by federal mandate the state must keep its inanimate equipment safe, it must also deal with its employees according to the manner set forth in the Labor Act—a federal mandate.

It has been held that the state is subject to the federal Carriers' Taxing Act in operating the Belt Line, which act is for the purpose of raising revenue to pay for *retirement of railroad employees*; that the federal statutory right to receive retirement pay is binding upon the state. In *State of California v. Anglim*, 9 Cir., 129 F.2d 455, that issue was presented. There is no possible basis to distinguish that case from the one at bar and the majority opinion makes no attempt to do so. If payment of retirement to state employees of a state carrier is controlled by the federal law although the state is not named in the statute, certainly federal statutory provisions for collective bargaining which embrace wages and working conditions are binding on the state. Retirement or pension payments have always been considered as deferred compensation or wages. Moreover, under the majority holding an anomalous situation is created. The payment of wages before

retirement would be controlled by state law while subsequent wages (pension payments) would not. The analogy between the cases compels the same result. Hence the majority opinion violates the fundamental rule that a state court is bound by the construction of a federal statute by a federal court. *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104.

In discussing a federal statute requiring consent of Congress for the construction of a dam on navigable streams, the court said in *United States v. State of Arizona*, 295 U.S. 174, 184, 55 S.Ct. 666, 669, 79 L.Ed. 1371: "These provisions unmistakably disclose definite intention on the part of Congress effectively to safeguard rivers and other navigable waters against the unauthorized erection therein of dams or other structures for any purpose whatsoever. The plaintiff maintains that the restrictions so imposed apply *only to work undertaken by private parties*. But no such intention is expressed, and we are of opinion that none is implied. The measures adopted for the enforcement of the prescribed rule are in general terms and purport to be applicable to all. No valid reason has been or can be suggested why they should apply to private persons and not to federal and *state officers*." (Italics added.)

In *State of California v. United States*, 320 U.S. 577, 64 S.Ct. 352, 88 L.Ed. 322, the court held that the United States Maritime Commission could regulate the rates of the Oakland city harbor, and in answer to the claim that the Congressional Act did not apply to the city, stated that the issue was no longer open at this late date, citing *United States v. State of California*, supra, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567. Certainly what the city shall

charge is as much a matter peculiarly within its power as the relations with its employees.

It has been held that the Federal Employers' Liability Act which provides for the recovery of damages by railroad employees for injuries suffered in the course of their employment, applies to the Belt Line here involved. *Maurice v. State of California*, 43 Cal.App.2d 270, 110 P.2d 706. No attempt is made to distinguish that case and it cannot be done. The act in question deals with the rights and duties as between employer and employee the same as the Railway Labor Act.

Finally, the identical question here presented has been decided. In *National Council of Railway Patrolmen's Union, A. F. of L. v. Sealy*, D.C., 56 F.Supp. 720, 722, the court dealt with whether patrolmen, hired by the city to patrol the harbor where the city operated a carrier, were subject to the Railway Labor Act. The court held they were not because they were not employees of the city as a carrier, but said, citing the cases heretofore discussed: "Most of the cases cited by Plaintiffs throw some light on the question of coverage, but are not controlling. *United States v. California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567; *State of California v. Latimer*, 305 U.S. [255], 257, 59 S.Ct. 166, 83 L.Ed. 159, and *State of California v. Anglim*, 9 Cir., 129 F.2d 455, of course, settle it that a railroad, etc., owned by the State or as here by a City which is an agency of the State is, under certain circumstances and perhaps generally speaking, within the coverage of the [Railway Labor] Act." (Italics added.) That case was affirmed on appeal, 5 Cir., 152 F.2d 500, the court not discussing the instant point but deciding that whether the patrolmen were under the act must be decided

by the Interstate Commerce Commission. It should be noted that there had been no determination here by that commission.

As above seen, we have three unqualified instances in which *federal* statutes dealing with the relationship between the *employer and employee in the railroad field* have been held to be applicable to the state with reference to the *same* Belt Line Railroad. Yet, in face of this wealth of authority, the majority advances nebulous and negative grounds for concluding that the Railway Labor Act, which deals with the *same* relationship in the *same* field does not apply. No effort is made to distinguish those cases.

The first ground advanced is that a statute does not apply to the government unless it so states. That proposition as presently involved was disposed of in *United States v. State of California*, supra, *Maurice v. California*, supra, and *State of California v. Anglin*, supra. The act itself, Railway Labor Act, is comprehensive and inclusive. It must be liberally construed, *Nashville C. & St. L. Ry. v. Railway Employees' Dept.*, etc., 6 Cir., 93 F.2d 340, certiorari denied, 303 U.S. 649, 58 S.Ct. 746, 82 L.Ed. 1110, and it has been held that it applies to the receiver of a railroad, *Burke v. Morphy*, 2 Cir., 109 F.2d 572, although the receiver is subject to the control of the appointing court.

The second argument of the majority that rates of pay and working conditions of public employees are traditionally a matter of state statutory and administrative regulation does not shed any light on the subject. That argument applies with equal force to rights arising under provisions for retirement, for injuries in the course of employment, and the safety requirements. They are no less

traditionally regulated, as to public employees, by statute and administrative regulation. Nevertheless the cases hold, as above shown, that the federal railroad laws control because of their effect upon interstate commerce.

That Congress has "consistently" excluded the state from labor laws—the third ground—is equally untenable. If that is true, then it supports my position, for Congress thought it must use language excluding the state when it desired to do so, and it did. But it did not employ such language in the Railway Labor Act and in the field of employee—employee relations in the railroad industry, and the courts have consistently held that the federal legislation includes the state.

In speaking of the history of the act—the fourth ground—the majority approach is wholly negative. It is said that it gives no indication that the state as a carrier was to be included. But it gives no indication to the contrary. True, the act probably arose out of cooperation between the unions and private carriers, but no doubt the other federal railroad laws were similarly initiated.

The majority opinion sets forth the additional ground for invalidating the contract that it was not approved by the Department of Finance of the State. There has been a substantial, although informal, approval by the state of the contract. It has been in force since 1942, and wages have been paid according to the rates provided for therein since that time. The Department of Finance knew of such payments and gave implicit approval of them, for it "may require from all such agencies of the State financial and statistical reports, duly verified covering the period of each fiscal year." Govt. Code, § 13291. And "may examine all records, files, documents, accounts and all financial af-

fairs of every agency mentioned in Section 13290." Govt. Code, § 13293. And it "*shall* examine and expert the books of the several State agencies, at least once in each year, and as often as the director deems necessary." Govt. Code, § 13294. Hence it has examined the books and records of the Harbor Board, which would include the collective bargaining contract and the payments to employees and has found them proper.

It is apparent that the last mentioned issue should not be so lightly brushed aside. The majority holds that the Harbor Board has the right to fix the pay of the employees subject to the approval of the Department of Finance and also that such employees are under civil service. If they are under civil service it is very doubtful that the Legislature may provide that their rate of pay be fixed by the Harbor Board or be subject to the approval of the Department of Finance. The rates of pay certainly relate to civil service for the Personnel Board is empowered by statute to fix the rate of pay. Govt. Code, §§ 18500(c) (1) (6), 18850 et seq. The Constitution vests civil service matters exclusively in the State Personnel Board. "Said board shall administer and enforce, and is vested with all of the powers, duties, purposes, functions, and jurisdiction which are now or hereafter may be vested in any other State officer or agency under Chapter 590 of the California Statutes of 1913 as amended or any and all other laws relating to the State civil service as said laws may now exist or may hereafter be enacted, amended or repealed by the Legislature." Cal. Const., art. XXIV, § 3(a).

Irreconcilable conflicts in state and federal law will necessarily result from the holding of the majority in this

case. Under its holding, State Belt Railroad employees are under civil service, but their salary must be fixed by the Harbor Board with the approval of the Department of Finance. This holding is in conflict with both the Constitution of California and the Government Code, see Cal. Const., art. XXIV, § 3(a) and Govt.Code, § 20000 et seq., which provide that the qualifications, rates of pay, dismissals and the like are all within the jurisdiction of the State Personnel Board, and that there is a state retirement system which embraces all civil service employees. All such employees automatically become members of the retirement system, Govt.Code, § 20303, and, therefore, must contribute to it. Id. 20600 et seq. Hence, if, as is held by the majority, the instant employees are civil service employees, they must be members of the state retirement system and contribute to it, but the majority opinion concedes that they are subject to the federal Railroad Employees' Retirement Act, 45 U.S.C.A. § 228a et seq., see *State of California v. Anglim*, 9 Cir., 129 F.2d 455. There is no basis for splitting the complete system of employer-employee relations between the state and its employees into parts, some of which are controlled by state law and others by federal law. The majority holding leads to absurd results. This would be avoided by holding that all of the federal statutes relating to railroad employer-employee relations apply to State Belt Railroad employees. The trial court and the District Court of Appeal so held in this case, *State v. Brotherhood of Railroad Trainmen*, Cal.App., 222 P.2d 27. That holding is eminently sound.

I would, therefore, affirm the judgment.

Certiorari denied by U. S. Supreme Court, 342 U.S. 876.

Appendix C

45 U.S.C.A.—RAILWAY LABOR ACT.

§ 151. *Definitions*

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supply-

ing of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities:

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders; *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway

employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act." May 20, 1926, c. 347, § 1, 44 Stat. 577; June 7, 1934, c. 420, 48 Stat. 926; June 21, 1934, c. 691, § 1, 48 Stat. 1185; June 25, 1936, c. 804, 49 Stat. 1921; Aug. 13, 1940, c. 664, §§ 2, 3, 54 Stat. 785, 786; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949 c. 139, § 127, 63 Stat. 107.

§ 151a. *General purposes.*

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a

condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186.

§ 152. *General Duties—Duty of carriers and employees to settle disputes*

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective

bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Agreement to join or not to join labor organization forbidden

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements

concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Notices of manner of settlement of disputes; posting

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim,

in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and estab-

lish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Violations; prosecution and penalties

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine or not less than \$1,000, nor more than \$20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United

States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Union security agreements; check-off

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assess-

ments* (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization* representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pur-

suant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238.

§ 153. *National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards*

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members

of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) , If either the carriers or the labor organization of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraph (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether

or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and

apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach

an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name

the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating

office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

Establishment of system, group, or regional boards by voluntary agreement

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. May 20, 1926, c. 347, § 3, 44 Stat. 578; June 21, 1934, ch. 691, § 3, 48 Stat. 1189.

§ 155: Functions of Mediation Board—Disputes within jurisdiction of Mediation Board

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents

Third. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this chapter. When so acknowledged, or when

acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be

submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof; another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

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§ 156. *Procedure in changing rates of pay, rules, and working conditions*

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions; and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.

Appendix D

INTERSTATE COMMERCE ACT—49 U.S.C.

§ 1. *Regulation in general; car service; alteration of line—Carriers subject to regulation.*

(1) The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

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(2) *Transportation subject to regulation.* The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

(c) To the transportation of passengers or property by a carrier by water where such transportation would

not be subject to the provisions of this chapter except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

Definitions.

(3) (a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ven-

tilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

Appendix E

PERTINENT PROVISIONS OF CALIFORNIA CONSTITUTION AND STATUTES RELATING TO CIVIL SERVICE.

CALIFORNIA CONSTITUTION, ARTICLE XXIV.

Appointments and Promotion in State Civil Service.

Sec. 1. 'Permanent appointments and promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination. [New section adopted November 6, 1934.]

Offices and Employments Exempt From Civil Service.

Sec. 4. (a) The provisions hereof shall apply to, and the term "state civil service" shall include, every officer and employee of this State except:

- (1) State officers elected by the people.
- (2) State officers directly appointed by the Governor with or without the consent or confirmation of the Senate and the employees of the Governor's office.
- (3) State officers and employees directly appointed or employed by the Attorney General or the Judicial Council; or by any court of record in this State or any justice, judge or clerk thereof.
- (4) State officers and employees directly appointed or employed by the Legislature or either house thereof.
- (5) One person holding a confidential position to any officer mentioned in paragraphs (1), (2) or (4) hereof except that there shall be but one such position to any board or commission composed in whole or in part of

officers mentioned in said paragraphs, each such person to be selected by the officer, board or commission to be served.

(6) One deputy for the Legislative Counsel and for each state officer elected by the people, each such deputy to be selected by the officer to be served.

(7) Persons employed by the University of California.

(8) Persons employed by any state normal school or teachers college.

(9) The teaching staff of all schools under the direction or jurisdiction of the Superintendent of Public Instruction, the Department of Education or the director thereof or the State Board of Education who otherwise would be members of the State civil service.

(10) Employees of the Federal Government, or persons whose selection is subject to rules or requirements of the Federal Government, engaged in work done by cooperation between the State and Federal Government or engaged in work financed in whole or in part with federal funds.

(11) Persons appointed or employed by or under the State Board of Prison Directors or any warden of a state prison.

(12) The officers and employees of the Railroad Commission.

(13) Member help in the Veterans' Home of California and inmate help in all state charitable or correctional institutions.

(14) The members of the militia of the State while engaged in military service.

(15) Officers and employees of district agricultural associations employed less than six months in any one calendar year.

(16) Stewards and veterinarians of the California Horse Racing Board who are not employed on a full time basis.

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CALIFORNIA GOVERNMENT CODE.

§ 18500. *Purpose.* It is the purpose of this part:

(a) To facilitate the operation of Article XXIV of the Constitution.

(b) To promote and increase economy and efficiency in the State service.

(c) To provide a comprehensive personnel system for the State Civil service, wherein:

(1) Positions involving comparable duties and responsibilities are similarly classified and compensated.

(2) Appointments are based upon merit and fitness ascertained through practical and competitive examination.

(3) State civil service employment is made a career by providing for security of tenure and the advancement of employees within the service whenever practicable.

(4) The rights and interests of the State civil service employee are given consideration insofar as consistent with the best interests of the State.

(5) A high morale is developed among State civil service employees by providing adequately for leaves of absence, vacations, and other considerations for the general welfare of the employees.

(6) Tenure of civil service employment is subject to good behavior, efficiency, the necessity of the performance of the work, and the appropriation of sufficient funds.

§ 18702. *Creation and adjustment of classes of positions.* The board shall create and adjust classes of positions in the State civil service in accordance with Article XXIV of the Constitution and this part.

§ 18703. *Provision for dismissals, demotions, suspensions, and other punitive action.* The board shall provide for dismissals, demotions, suspensions, and other punitive action for or in the State civil service in accordance with Article XXIV of the Constitution and this part.

§ 18705. *Rules for days, hours, and conditions of work. Matters to be taken into consideration.* In order to secure substantial justice and equality among employees in the State civil service, the board may provide by rule for days, hours and conditions of work, taking into consideration the varying needs and requirements of the different state agencies and the prevailing practices for comparable services in other public employment and in private business.

§ 18710. *Orders and decisions of board binding: Refusal to comply: Procedure.* All orders and decisions of the board made pursuant to Article XXIV of the State Constitution or this part shall be obeyed by and are binding upon appointing powers and employees.

If any appointing power refuses or neglects to comply with any such order or decision, the board may issue an order to show cause, directed to such appointing power, why the board should not file a petition for a writ of man-

date to compel such appointing power to comply with such order or decision.

If the board finds that no good cause exists for the refusal or neglect of the appointing power to comply with such order or decision, the board shall file a petition for a writ of mandate in the manner and in the court provided for by law to compel such appointing power to comply with such order or decision.

This procedure for the enforcement of the orders and decisions of the board is in addition to any other means or procedure which may be provided by law.

§ 18850. *Establishment and adjustment of salary ranges: Basis: Factors to be considered: Adjustments not to require expenditures in excess of appropriations: Retroactive changes.* The board shall establish and adjust salary ranges for each class of position in the State civil service. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. The board shall make no adjustments which require expenditures in excess of existing appropriations which may be used for salary increase purposes. The board may make a change in salary range retroactive to the date of application for such change.

§ 18853. *Salary limits for laborers, workmen, and mechanics: Uniformity: Prevailing rate: Factors to be considered.* The minimum and maximum salary limits for laborers, workmen, and mechanics employed on an hourly

or per diem basis need not be uniform throughout the State, but the appointing power shall ascertain and report to the board, as to each such position, the general prevailing rate of such wages in the various localities of the State.

In fixing such minimum and maximum salary limits within the various localities of the State, the board shall take into account the prevailing rates of wages in the localities in which the employee is to work and other relevant factors, and shall not fix the minimum salary limits below the general prevailing rate so ascertained and reported for the various localities.

§.18854. *Automatic salary adjustment after completion of first year of employment: Service rating required.* After completion of the first year in a position, each employee shall receive a merit salary adjustment equivalent to one of such intermediate steps during each year when he meets such standards of efficiency as the board by rule shall prescribe.

Rules and Regulations of California State Personnel Board (Title 2, California Administrative Code, Section 111):

Prevailing Rate. (a) For each class for which the salary range is designated by the board as "prevailing rate," the executive officer shall determine and promulgate, as often as conditions require, a prevailing rate range in which:

- (1) the minimum salary limit shall be the prevailing rate paid in each locality for the type of work in question;

(2) there shall be one intermediate step which shall be either 5 cents an hour or 40 cents a day higher than the minimum salary limit; and

(3) the maximum salary limit shall be 10 cents an hour or 80 cents a day above the minimum salary limit.

(b) In establishing a prevailing rate range, the executive officer shall confer with and take into account the findings of state, county, municipal, and other official public bodies engaged in determining the prevailing rate in connection with the awarding of contracts for public works and shall consider such other sources of pertinent information as may be available.

(c) Whenever the prevailing rate range for a class is revised, the salary of each incumbent in a position to which the revised range applies shall be adjusted to the step in the revised range that corresponds to the step he received in the previous range; and such salary adjustment shall not affect the date of his eligibility for a merit salary adjustment.

§ 18004. *Department of Finance to approve salary of officer or employee.* Unless the Legislature specifically provides that approval of the Department of Finance is not required, whenever any state agency or court is authorized by special or general statute to fix the salary or compensation of an employee or officer, which salary is payable in whole or in part out of state funds, the salary is subject to the approval of the Department of Finance before it becomes effective and payable.

Appendix F

PERTINENT SECTIONS OF CALIFORNIA HARBORS AND NAVIGATION CODE RELATING TO BOARD OF HARBOR COMMISSIONERS FOR SAN FRANCISCO HARBOR.

§ 1700. There is in the State Government a Board of State Harbor Commissioners for San Francisco Harbor, consisting of three commissioners. This board is the successor to all previous boards of State Harbor Commissioners for San Francisco Harbor. All vacancies on the board shall be filled by appointment by the Governor. When an appointment of a successor to any commissioner is made by the Governor, it is valid, subject to the consent of the Senate at its next regular session. Until such session the person appointed has the same authority as if his appointment had been confirmed by the Senate.

§ 1732. *Officers and employees to be appointed by board.* The board shall appoint the following officers: A port manager and, *subject to civil service laws*, a secretary and administrative assistant, an assistant secretary, a chief wharfinger, any necessary number of wharfingers and collectors, and such other officers as it finds necessary. It may appoint *and employ, subject to civil service laws*, such other technical, administrative, clerical and *other necessary* assistants and *employees* as it finds necessary to the performance of the its functions and duties. (Emphasis ours.)

§ 1732.7 The port manager is the executive officer of the board. Subject to the direction and control of the board, and on its behalf, he shall:

(a) Supervise the conduct of the officers and employees of the board other than the commissioners.

(e) Except as provided by Sections 1732 and 1740, appoint, subject to the State Civil Service Act, such assistants and other employees as are necessary for the administration of the affairs of the board, prescribe their duties, fix salaries, and require them to execute to the State such official bonds as seem advisable.

(f) Manage the dock system, the State Belt Railway and all other departments of the harbor business.

§ 1990. *Signatures and countersignatures necessary for contract over \$250: Contract for \$250 or less: Sufficiency of fund to meet payments: Time limit for revenue estimate.* The board cannot enter into a valid contract or obligation with a person other than another state agency, which creates a liability or authorizes the payment of money in excess of two hundred fifty dollars (\$250), unless it is signed by two of the commissioners, and countersigned by the secretary or assistant secretary of the board. The board may enter into a valid contract or obligation which creates a liability or authorizes the payment of money of two hundred fifty dollars (\$250) or less or authorizes payment to another state agency by having such contract or obligation signed by an officer authorized by the board. The board shall not make any contract, involving the payment of money, unless the amount then to the credit of the Harbor Improvement Fund, plus any sums which may be derived from the sale of bonds, together with the revenue estimated to accrue up to the time of the maturity of the contract, over and above the

current expenses of the board, is sufficient to meet the payments to become due thereon. The estimate of revenue shall be limited, as to time, to 15 years.

§ 3084. *Amount of money to be collected: Limitation.*

A greater amount of money shall not, in the main, be collected pursuant to this part than is necessary to enable the board to perform the duties required, or to exercise the powers authorized, by this part, and to provide for interest and redemption requirements for bonds issued for any of the purposes which this part is intended to promote.

§ 3150. The board may locate, construct, maintain, operate and extend the State railroad, and railroad tracks, through, over, under and upon any State lands, or the water front or lands within its jurisdiction, * * *.

Appendix G

The principal conflicts between the State Civil Service Laws and the Contract negotiated pursuant to Railway Labor Act:

1. RATES OF PAY AND OVERTIME.

Civil Service. Fixed by State Personnel Board* (Gov. C. sec. 18850) with right of review in State Courts.

Contract. Fixed by the Contract. Disputes first presented to the Harbor Board and then, pursuant to the Railway Labor Act, to the Railroad Adjustment Board (45 U.S.C. 153(i)). Enforcement of the Board's order may be had in the designated Federal District Courts (45 U.S.C. 153(p)).

2. DISMISSAL, DEMOTION, SUSPENSION.

Civil Service. Complete procedure under Government Code Section 19570 et seq., providing for notice and hearing. Review in State Courts.

Contract. Hearing before superintendent of State Belt (Art. 23) appeal to State Personnel Board (Art. 17), then to Railroad Adjustment Board (45 U.S.C. 153(i)). Enforcement of Adjustment Board's order in U. S. District Courts (45 U.S.C. 153(p)).

3. SICK LEAVE.

Civil Service. Unlimited right to accumulate (Gov. C. sec. 18101).

*The power of the State Personnel Board is based upon Art. XXIV of the Constitution of the State of California, and the Civil Service Act (Gov. C. 18500, et seq.). The cited Rules are those of the State Personnel Board (Gov. C. 18701).

Contract. Accumulation limited to 100 days (Art. 25, sec. 2).

4. LEAVES OF ABSENCE.

Civil Service. One (1) year permitted (Gov. C. sec. 19330 and Rule 362).

Contract. Sixty days except that an employee with five (5) years service may be granted a leave for one (1) year (Art. 20).

5. PROMOTIONS.

Civil Service. From promotional lists (Gov. C. 18950) based upon written examination and efficiency ratings (Rules 171 et seq. and 238).

Contract. For yardmen—upon seniority and ability (Art. 13).

6. LAY-OFFS.

Civil Service. In accordance with efficiency and seniority (Gov. C. 19533).

Contract. In accordance with seniority alone with enginemen displacing junior firemen (Art. 14(d)).

7. DURATION OF EMERGENCY EMPLOYEES.

Civil Service. Appointments terminated ninety days after the ending of the war emergency (Gov. C. 19200).

Contract. Because the contract provides that after service of six (6) months application is deemed approved (Art. 24), Respondent Brotherhoods contend employees given duration appointments during the war emergency now have permanent status.

Appendix H

EXTRACTS FROM BRIEF OF STATE OF CALIFORNIA AND PETITION FOR REHEARING BY STATE OF CALIFORNIA IN TAYLOR, ET AL., v. FEE, ET AL., UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT, NO. 11,573, DEMONSTRATING THAT CALIFORNIA DID NOT IN FACT WAIVE CERTAIN CONTENTIONS WHICH WERE SO-TREATED BY THE COURT OF APPEALS.

1. *Extract from Brief of State of California as Intervening Defendant-Appellee (pages 2-5):.*

INTERVENING DEFENDANT'S STATEMENT OF CONTESTED ISSUES.

If the ruling of the lower court that the contract must be regarded as invalid is correct—that will be an end of the matter. As the Adjustment Board only has jurisdiction to interpret and apply valid existing contracts, there would be no basis for granting plaintiff's prayer that the Board be ordered to hear and determine the claims based on the contract. Consequently, we believe this court would first wish to pass upon this determinative issue. On this issue the following questions are presented:

(1) The decision of the lower court that the Adjustment Board should not be required to pass upon the validity of the contract or the application of the Railway Labor Act was correct.

(2) The granting of the summary judgment on the ground that the decision of the California Supreme Court holding the contract invalid was controlling here was correct. This ruling is supported either as a matter of *res judicata* (Issue 3, Pl. Br.) or upon the ground that the decision of the California court pertained to a matter of state law.

(3) California is not estopped to assert the invalidity of the contract with reference to the instant claims (Issue 4, Pl. Br. 9).

Position of State of California on other issues.

In addition to relying on the invalidity of the contract as determined by the California Supreme Court in *State of California v. Brotherhood of Railroad Trainmen* (37 Cal.2d 412, 232 Pac. 857—Appdx. I et seq.), the State of California also contends

a. The Railroad Adjustment Board lacks jurisdiction to hear and determine plaintiffs' claims because the Railway Labor Act was not intended by Congress to control a state's relationship with its employees (Issue 1, Pl. Br. 8).

b. The decision of the California Supreme Court that the Railway Labor Act was not applicable to the State of California, was *res judicata* (Issue 2, Pl. Br. 8).

c. If the Railway Labor Act is held to be applicable to the State of California, then the Act is an unconstitutional interference with a state's relationship with its employees¹ (Issue 4, Pl. Br. 9).

¹The seriousness and scope of the constitutional question is considerable. A state personifies itself and carries out its powers as a sovereign state under the Federal Constitution through its employees. It has an inherent right, free of Federal control, to select and employ, in the manner prescribed by its laws, employees who will perform state functions. The proposition that the Federal government may interfere with the state-employee relationship whenever the state activity is interstate in character strikes at the heart of the reserve powers of the states. After all, it is the existence of states that creates interstate situations. State owned and operated highways, harbors, trade zones, bridges, and reclamation, irrigation and power projects would be affected by the hitherto unprecedented proposition.

d. The contract is also invalid because the Harbor Board lacked authority to negotiate terms of the contract in conflict with the State Constitution and civil service laws.

e. If the contract is valid and may be enforced, the authority of the Adjustment Board to decide the instant claims is precluded by the provision in the contract that a system board—the State Personnel Board—shall hear and decide these claims (45 U.S.C. sec. 153-Second).

f. If, nevertheless, the Adjustment Board does have jurisdiction over these claims the Board should not be required to render awards because such awards could not be enforced against the State of California in the Federal courts as the Railway Labor Act provides, because of the inhibition of the Eleventh Amendment of the United States Constitution.

It can easily be seen that if this court sustains the ruling of the lower court that the invalidity of the contract is *res. judicata* or conclusive as a matter of California law then it would be unnecessary to explore and brief the more complex and comprehensive questions set forth above. We recognize that the brief of plaintiffs, attempts to argue some of these questions and to ignore others. But we respectfully suggest that the issue of the validity of the contract be first decided—the method used by the lower court. The rendition of a decision that the contract is valid will then provide a more appropriate occasion to consider the larger and other issues.

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2. *Extracts from Petition for Rehearing by State of California as Intervening Defendant-Appellee:*

a. *From the "Introductory Statement", pp. 4 and 5:*

Because they were only stated, but not briefed, the opinion treats as waived the following contentions:

(1) If the Railway Labor Act is held to be applicable to the State of California, then the Act is an unconstitutional interference with a State's relationship with its employees.

(2) The contract is also invalid because the Harbor Board lacked the authority to negotiate terms of the contract in conflict with the State Constitution and civil service laws.

(3) If, nevertheless, the Adjustment Board does have jurisdiction over these claims, the Board should not be required to render awards because such awards could not be enforced against the State of California in the Federal courts as the Railway Labor Act provides, because of the inhibition of the Eleventh Amendment of the United States Constitution.

(4) If the contract is valid, the provision for a system board to hear plaintiffs' grievances precludes the Adjustment Board from hearing them.

All these points were fully argued below. It was found unnecessary to pass upon them, because of the court's decision that the judgment of the California court was controlling with respect to the validity of the contract. These points have been made by California in the submissions to the Adjustment Board in the instant dockets. It would be a serious misrepresentation of California's

position to say that these issues have been waived, under these circumstances.

b. *From the "Argument", pages 27-31:*

IV.

DEFENDANTS WERE DEPRIVED OF THEIR DAY IN COURT TO PRESENT THEIR OTHER CONTENTIONS BEARING UPON THE LACK OF JURISDICTION OF THE RAILROAD ADJUSTMENT BOARD.

The action of the Circuit Court in treating as waived the important and serious questions concerning the authority of the court to order the Adjustment Board to hear the instant claims as being waived should be reconsidered in the light of the following facts:

The District Court granted the motion of the State of California for a summary judgment upon the ground that the authority of the Adjustment Board was limited to the interpretation and application of valid contracts and that the decision of the Supreme Court of California that, as a matter of State law, the contract upon which the claims were based, was invalid, had to be treated by the court as binding and conclusive by the Federal Courts. Therefore, the District Court found it unnecessary to decide the many other questions presented below. In the intervening-defendant-appellees' brief, it was pointed out that, if the decision of the District Court in granting California's motion for summary judgment was upheld, likewise there would be no reason to take up the questions which this court has treated as being waived.

It is an understatement to say that the Attorney General as counsel for the intervening-defendant, was completely taken aback by the statement that California had

waived questions which it had persistently been raising since the start of the controversy with respect to the application of the Railway Labor Act to the State Belt. Throughout from the trial court in the *California* case to this court, California has contended that, if the Railway Labor Act was held to apply to a State operated railroad, the following questions remain to be solved:

(a) If the Act applies to the State of California, is the Railway Labor Act constitutional?

(b) Do the provisions of the contract which contravene the civil service laws and regulations of the State of California supersede these laws and regulations?

(c) Are those employees who are within the provisions of the collective bargaining contract also members of the State Civil Service System? (R. 56.)

(d) Does the Act violate the Eleventh Amendment when it would authorize actions in the Federal court against the State of California to enforce money awards rendered by the Railroad Adjustment Board?

When the matter was before the California Supreme Court, the above unanswered questions (here deemed waived) were presented. However, as the decision of the California court indicates, it was found unnecessary to consider the two constitutional questions. The decision, in effect, holds that the State officials would not have authority to change civil service laws by collective bargaining.

The same contentions have been made in the individual dockets pertaining to the claims of plaintiffs before the Adjustment Board in the instant action. They are part

of the record here (R. 33-35). California, as the intervening defendant, in addition to the above questions, presented this additional issue:

(e) If the contract is valid and may be enforced, does the Adjustment Board have jurisdiction to decide the instant claims when the contract provides that a System Board—the State Personnel Board—hear and decide these claims? (45 USC sec. 153—Second.)

While noting these issues (R. 60), the District Court, in its opinion found it unnecessary to determine them, because, as the existence of a valid contract was a prerequisite to the Adjustment Board's jurisdiction, California was entitled to summary judgment. Pursuant to Rule 75(d) of the Rules of Practice and Procedure for United States District Courts, all these were designated as issues by the plaintiffs-appellants (R. 75-76 pts. Nos. 10, 11, 12, 15, 16, 20). California has definitely stated that its brief was limited to upholding the action of the District Court granting our motion for a summary judgment. It seemed to be an unnecessary burden on this court—a waste of paper and ink—and the time of all parties concerned if the case was to be decided on the determinative ground upon which the lower court acted. However, if this court were to overrule the District Court, then California stated that it wished an opportunity to argue and brief the (indicated) questions (California—Brief of Intervening-Defendant-Appellee, pp. 2-5).

To say that this approach to the problem is a waiver of these contentions is to state what is obviously not the situation. Each of these contentions merits the attention of this court or the court below upon a remand.

If the order of this court is to be carried out, namely, that the District Court issue a decree granting plaintiffs the relief prayed for, i.e., that the Adjustment Board proceed to hear and determine the claims, the effect is that all these issues will have to be resolved by the Adjustment Board. It should take very little consideration to realize how inappropriate it is to place this burden upon the Adjustment Board. In fact, the resolution of these questions is beyond its jurisdiction, with the possible exception of the question of the interpretation of the contract provisions referring grievances to a System Board. It should be noted that the District Court, in its decision in effect held that these decisions were properly for resolution by the courts rather than the Adjustment or Mediation Boards (R. 62-63). It should be remembered that at the instigation of this action the carrier members of the First Division, in effect brought these questions to the Federal court for settlement. The District Court held that they had properly done so:

"Thus the plaintiffs were confronted with a true administrative deadlock on a jurisdictional issue which this court may pass upon, and they properly brought the dispute to court."

In a footnote to this part of the case, the District Court said:

"The Board is not the typical quasi-judicial administrative agency. Its members are actually representatives of the two parties to most disputes before the Board, and their particular contribution is that they 'understand railroad problems and speak the railroad jargon.' *Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239, 243 (1950)." (R. 63.)

Therefore, in view of the fact that the Act does not contemplate that the Adjustment Board should be required to pass upon and decide these serious and important questions of constitutional law and other questions of statutory construction, we will set forth here the position of the State of California on these issues, in the expectation that this court or the trial court will resolve them. .

[Following the foregoing statement, each of the points previously regarded as waived by the Court of Appeals was argued. (See pages 31-49 of the Petition for Rehearing:)]

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FEB 13 1957

JOHN T. FEY, Clerk

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1956

No. 385

STATE OF CALIFORNIA,

Petitioner,

VS.

HARRY TAYLOR, PETER A. CALUS, JAMES W.
BREWSTER, et al.,

Respondents.

BRIEF FOR PETITIONER.

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In the Supreme Court

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OCTOBER TERM, 1956

No. 385

STATE OF CALIFORNIA,

Petitioner,

vs.

HARRY TAYLOR, PETER A. CALUS, JAMES W.

BREWSTER, et al.,

Respondents.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 84-97) is reported in 233 F. 2d 251. The memorandum opinion of the District Court (R. 57-66, 71-72) is reported in 132 F. Supp. 536. The supplemental memorandum of the District Court is unreported (R. 71-72).

JURISDICTION.

The judgment of the Court of Appeals was entered April 23, 1956 (R. 97). A timely petition for rehearing was filed May 23, 1956, and was denied June 7, 1956 (R. 98). Petition was filed September 5, 1956, and was granted December 10, 1956 (R. 98). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

The State of California owns and operates the State Belt Railroad as part of the facilities of the Harbor of San Francisco, which railroad is engaged in interstate commerce. The Board of Harbor Commissioners for San Francisco Harbor negotiated a collective agreement with representatives of the State Belt employees. Certain employees have filed claims against the State of California with National Railroad Adjustment Board under section 3 of the Railway Labor Act (sec. 3(i), 48 Stat. 1189, 45 U.S.C. § 153(i)). The judgment of the court below would order the Board to hear and make awards on these claims:

1. Whether the Railway Labor Act applies to a state in the operation of an interstate railroad carrier.
2. Whether the National Railroad Adjustment Board has jurisdiction over claims based on a collective agreement which is in conflict with and violates the civil service laws of the State of California.

STATUTES INVOLVED.

The statutory provisions involved are the Railway Labor Act (44 Stat. 577 (1926), 48 Stat. 1185 (1934), 45 U.S.C.A. §§ 151-163 (1954), the pertinent portions of which are printed in appendix C*); section 1(1)-(3) of the Interstate Commerce Act (24 Stat. 379 (1887), as amended, 49 U.S.C.A. § 1(1)-(3) (1955 Supp.), app. D); Amendment XI, United States Constitution; Article XXIV, California Constitution, Article XXIV (app. E); State Civil Service Act, California Government Code

*Appendix is that attached to Petition for Certiorari.

sections - 18500 *et seq.* (app. E); California Harbors and Navigation Co., sections 1700, 1732; 1732.7, 1990, 3084, 3150 (app. F).

STATEMENT.

The judgment of the Court below would compel the First Division of the National Railroad Adjustment Board to take jurisdiction and decide claims of the five respondent-employees, filed with the Board against their employer, the State of California, under the provisions of section 3 of the Railway Labor Act¹ (sec. 3(i), 48 Stat. 1189, 45 U.S.C. sec. 153(i)). These state employees are engaged as engineers and trainmen in the operation of the State Belt Railroad which is owned and operated by California as part of the facilities of San Francisco Harbor. The "State Belt" is a terminal switching railroad about five miles in length and located entirely within the corporate limits of the City and County of San Francisco (*Sherman v. U. S.*, 282 U. S. 25, 29). It is regarded as a common carrier, engaged in interstate commerce (*United States v. California*, 297 U. S. 175). Its lines parallel the water front of San Francisco and serve some forty-five wharves and one hundred and seventy-five industrial plants. It has track or freight car ferry connections with three interstate railroads. The number of its employees varies between 125 and 225 persons (*State v. Brotherhood of RR Trainmen, et al.*, 37 Cal. 2d 412, 414, 232 P. 2d 857).²

¹44 Stat. 577, 48 Stat. 926, 48 Stat. 1185, 49 Stat. 1021, 54 Stat. 785, 62 Stat. 909, 62 Stat. 991, 63 Stat. 107, 63 Stat. 880, 63 Stat. 972, 64 Stat. 1238.

²Hereafter referred to as *State v. Brotherhoods* (R. 85, footnote 4).

Approximately 425 other State employees are employed on the non-railroad work of the harbor (R. 54). The Board of State Harbor Commissioners for San Francisco Harbor³ is authorized to operate and maintain the State Belt on "any State lands, or the water front or lands within its jurisdiction" (Calif. Harbors & Navigation Code sec. 3150, app. 83).⁴ Members of the Harbor Board are appointed by the Governor, subject to the consent of the State Senate (Calif. Harbors & Navigation Code sec. 1700, app. 81).

Under California's Constitution, all State Belt employees are members of the State Civil Service System (Calif. Const., Art. XXIV, app. 74). The constitutional provision states that "Permanent appointments and promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination" (sec. 1). The "State Civil Service Act," pursuant to the State Constitution, provides a comprehensive personnel system, based upon merit, efficiency and fitness, as ascertained by competitive examinations and for the employment, classification, promotion, salary ranges, and general working conditions for all members of civil service (Calif. Gov. Code sec. 18500, app. 76).⁵ These provisions are implemented by regulations of the State Personnel Board. Grievances involving status, seniority, lay-offs, rates, of

³Hereinafter referred to as the "Harbor Board".

⁴Appendix is that attached to petition for writ of certiorari.

⁵The State Civil Service Act sets forth its purpose as:

"(a) To facilitate the operation of Article XXIV of the Constitution.

(b) To promote and increase economy and efficiency in the State service.

(c) To provide a comprehensive personnel system for the

pay, hours of work, and classification, are heard and determined by the State Personnel Board with the right of review in the California courts (Calif. Gov. Code secs. 18714, 18803, 18851, 19541).

Employees in respondent's classifications are paid upon an hourly basis. Their rates of pay are fixed by the State Personnel Board, based upon the prevailing rate in the community (Calif. Gov. Code sec. 18853). After a year of service and meeting certain standards, they are paid one salary "step" above the prevailing rate (Calif. Gov. Code sec. 18854, app. 79).

The port manager, selected by the Harbor Board, appoints, "subject to the State Civil Service Act," employees of the Harbor (H. & N. Code sec. 1732.7, app. 81-82). The five respondent employees, two enginemen and three trainmen, took and passed qualifying civil service examinations and were appointed by the port manager of the Harbor Board from eligible lists established by the State Personnel Board (R. 27, 54).

State civil service, wherein:

(1) Positions involving comparable duties and responsibilities are similarly classified and compensated.

(2) Appointments are based upon merit and fitness ascertained through practical and competitive examination.

(3) State civil service employment is made a career by providing for security of tenure and the advancement of employees within the service whenever practicable.

(4) The rights and interests of the State civil service employee are given consideration insofar as consistent with the best interests of the State.

(5) A high morale is developed among State civil service employees by providing adequately for leaves of absence, vacations, and other considerations for the general welfare of the employees.

(6) Tenure of civil service employment is subject to good behavior, efficiency, the necessity of the performance of the work, and the appropriation of sufficient funds." (Calif. Gov. Code sec. 18500.)

On September 1, 1942, the Brotherhood of Railway Trainmen, representing the yard engine foreman and helpers, and the Brotherhood of Locomotive Firemen and Enginemen, representing the locomotive engineers, firemen and hostlers, asserted that California was subject to the Railway Labor Act and that the Harbor Board was required to collectively bargain with respect to working conditions and rates of pay for State Belt employees, in the classifications represented by them. Thereupon, the members of the Board entered into a collective bargaining agreement with the Brotherhoods. The contract provided for working conditions covering status, seniority, hours of work, and rates of pay (R. 100-116). A number of these provisions are in conflict with those of the State Civil Service Act and the regulations of the State Personnel Board' (*State v. Brotherhoods*, 37 Cal. 2d 412, 414, 232 P. 2d 857, 859, app. 84-85). The contract has never been changed (R. 55).

At various times between 1949 and 1951, the Brotherhoods, on behalf of the five respondent state employees in the present action, filed claims with the National Railroad Adjustment Board. The disputes concerned proper classification, extra pay, and seniority rights (R. 7-9).

All of the claims, with the possible exception of respondent Taylor's claim for classification as an engineer with seniority (R. 72), if allowed, would result in monetary awards against California, in favor of the individual respondents.⁶

⁶These claims or dockets before the Adjustment Board are part of the unprinted record (R. 99) and may be summarized as follows:

A subsequent Harbor Board, through the California Attorney General, in January, 1948, brought a declaratory judgment action in the California courts against the two Brotherhoods, as representative signatories to the contract to determine:

1. Do the provisions of the Railway Labor Act require the State of California to enter into collective bargaining with its employees engaged upon the State Belt Railroad?

—*Taylor*, Docket 24,211, filed April 5, 1949, by Brotherhood of Locomotive Firemen and Enginemen.

For classification as a permanent civil service engineer with certain seniority rights (R. 7, 33). Harbor Board asserts that Taylor did not have such a status, and that under civil service the State Personnel Board must decide the matter. Taylor contends he achieved the position and attendant seniority rights under the contract.

—*Brewster*, Docket 25,034, filed September 28, 1949, by Brotherhood of Railroad Trainmen.

Seeks reinstatement from civil service classification as a "war duration" switchman to permanent civil service position of switchman, and for full-time pay from date of removal from service on July 1, 1947 (R. 8, 33). Brotherhood alleges Brewster acquired permanent position under the contract. With respect to the issues here, California alleges the Adjustment Board lacks jurisdiction because the contract is invalid, in that Harbor Board had no authority to make a contract providing for conditions in conflict with State civil service.

—*Calus*, Docket 25,597, filed January 31, 1950, by Brotherhood of Locomotive Firemen and Enginemen.

Claims pay for one day, or eight hours of pilot service (R. 7, 34). Brotherhood asserts Calus performed two types of service on the day in question—switchman and pilot service, and should be paid for both under collective bargaining agreement. California moved for dismissal of claim, on ground Adjustment Board lacks jurisdiction, in that California, as the operator of the State Belt Railroad, is not subject to the Railway Labor Act.

—*Greer*, Docket 25,655, filed February 8, 1950, by Brotherhood of Locomotive Enginemen and Firemen.

Claim for pay for eight hours for services rendered as engine crew helper and engineman, pursuant to the terms of the

2. If the provisions do apply to the State of California, is the Railway Labor Act constitutional?

3. Is the collective bargaining contract valid?

4. Do the provisions of the contract which contravene the civil service laws and regulations of the State of California supersede those laws and regulations?

5. Are those employees who are within the provisions of a collective bargaining contract also members of the State Civil Service System? (R. 56).

A State Belt employee intervened, in effect also contending that pay and working conditions are governed exclusively by legislation or administrative rules and not by collective bargaining contract. The intervenor claimed that his benefits and privileges were less under the provisions of the contract than under the State Civil Service Act (R. 50; *State v. Brotherhood*, 37 Cal. 2d 412, 415, 232 P. 2d 857, 859; app. 24).

contract (R. 9, 34). In addition to the defense on the merits, California moved to dismiss claim for lack of jurisdiction, on the ground that California, as the owner and operator of the State Belt Railroad, is not subject to the Railway Labor Act.

—*Langston*, Docket 28,223, filed October 23, 1951, by Brotherhood of Railroad Trainmen.

Claim for pay for services for one day at overtime rate, performed as an engine foreman (R. 8, 34), stating said service performed pursuant to the contract. California, as far as the issues here are concerned, alleges Adjustment Board lacks jurisdiction because

- (a) California is not subject to the Railway Labor Act;
- (b) The contract is invalid;
- (c) All matters of employment for personnel of the State Belt are prescribed by the civil service laws of the State and all employees of the State Belt had been employed pursuant to those laws.

The California Supreme Court, in *State of California v. Brotherhood of RR Trainmen* (37 Cal. 2d 412, 232 P. 2d 857) held that .

1. Congress did not intend the Railway Labor Act to apply to a state operated carrier.

2. The particular contract was invalid under California law because it had not been approved by the California Department of Finance.

The decision impliedly "... sustained the applicability of the State civil service laws and regulations to the State Belt Railroad employees" (Respondent's Brief as Appellant before C.A., 7th, p. 7).

The California court found it unnecessary to take up the other questions.

This Court denied certiorari (342 U.S. 876).

Following denial of certiorari, the carrier members of the First Division of the National Railroad Adjustment Board advised the labor members that, on the basis of the ruling in the California case, the Board had no jurisdiction to hear the claims of State Belt employees, and would not participate in the handling of pending State Belt dockets other than to dismiss them (R. 11-12). Thereupon, on January 14, 1953, the five respondent State Belt employees brought an action in their own names in the District Court for the Northern District of Illinois, Eastern Division, seeking an injunction against the carrier members and Executive Secretary of the First Division to require them to hear and make awards on the claims which had been filed. Jurisdiction of the district court was

asserted on the ground that the Adjustment Board maintains its headquarters in Chicago, Illinois (45 U.S.C., sec. 153, First, (r)), and that the action was one arising out of an act of Congress regulating commerce (28 U.S.C. sec. 1337; (R. 6)).

The complaint set forth the facts of the disputes contained in the various dockets before the Adjustment Board and alleged that respondents had performed their services and had been paid, except as noted, pursuant to the collective agreement (R. 6-9).

The United States, through the United States Attorney General, answered on behalf of the First Division of the National Railroad Adjustment Board and the Executive Secretary thereof, and admitted all of the allegations of the complaint and joined in plaintiff's request for relief (R. 12-13).

The carrier members of the First Division appeared by special counsel. Among other defenses, the carrier members asserted that the jurisdiction of the Adjustment Board was limited to the interpretation and application of valid agreements, and that they lacked jurisdiction of disputes concerning the validity of agreements. With this reference, it was asserted that the California Supreme Court had held that the State Belt Railroad was not subject to the Railway Labor Act and that the particular contract upon which the claims before them were based, was invalid as a matter of law (R. 17-22). The carrier members, upon lack of information or belief, denied that plaintiffs had rendered services to the State Belt and had been paid, pursuant to the collective agreement (R. 18, 19).

California, asserting that it was the real defendant party in interest (R. 24), was permitted to intervene (R. 28-29). California concurred in the defenses raised by the carrier members, and contended that the decision of the California court, rendered with specific reference to the contract upon which respondents' claims were based, was *res judicata*, or, at the least, the ruling that the contract was invalid under California law, was binding upon the district court as a matter of state law. California alleged that rights to pay and conditions of work were all matters established by the civil service laws of California and that no rights were acquired by plaintiffs under the contract (R. 27). The state contended:

1. Aside from the issues of *res judicata* and the state decision, the Adjustment Board lacked jurisdiction to hear and decide respondents' claims because the Railway Labor Act was not applicable to a state;

2. If the act were held applicable, it was an unconstitutional usurpation of the right of a state to control its relationship with its employees.

3. California had not consented to be sued before the Board or in the district court, and that both the claims before the Board and the action were barred by the Eleventh Amendment.

4. The contract was also invalid because the former Harbor Board lacked authority to agree to all-pervading provisions of the contract which were in conflict with the California "State Civil Service Act."

5. Under section 3, second, of the Railway Labor Act and the contract, if valid, the California State

Personnel Board had jurisdiction to decide plaintiffs' claims (R. 26-28).

California (R. 31), the United States (R. 30) and respondents (R. 36) moved for summary judgments. In acting on California's motion, the district court upheld the contention of the carrier members that the Adjustment Board lacked jurisdiction to decide the basic dispute as to (1) the applicability of the Railway Labor Act to the State, (2) the validity of the contract upon which the claims were based, (3) the legal effect of *State v. Brotherhoods* on both of these issues (R. 63, footnote 4). The court then granted California's motion upon the ground that the jurisdiction of the Adjustment Board was limited to the interpretation and application of valid contracts and that "it must give conclusive effect" to the California decision, holding as a matter of state law that the contract was invalid because it had not been approved by the State Department of Finance as required by California law (R. 63). The other issues concerning the jurisdiction of the Adjustment Board—the application of the Railway Labor Act—either as a matter of *res judicata* or a matter of state law—the constitutionality of the collective bargaining or enforcement procedures of the Act as applied to a state, the over-all authority of the Harbor Board to enter into the contract, the authority of the Adjustment Board vis-a-vis that of the State Personnel Board to adjudicate the claims, were left undecided (R. 63 64).

Thereupon, respondents took an appeal to the Seventh Circuit Court of Appeals (R. 74). Included in their state-

ment of the contested issues, were—whether railroads engaged in interstate commerce are exempt from compliance with the Railway Labor Act if they are owned by a state, and whether a state acting through legislation and acting through administrative officers could dictate rates of pay, rules and working conditions of employees on a railroad owned by the state, in the face of a policy contained in the Railway Labor Act requiring carriers engaged in interstate commerce and the representatives of their employees to bargain collectively (app. Br. in ct. of ap., pp. 8-9).

The carrier members of the Adjustment Board, on the appeal, took the position that the district court had upheld their position that the First Division, of which they were the carrier members, was without jurisdiction to proceed and consider the claims pending before it unless the underlying dispute between the State Belt employees and the State of California as to whether the State Belt Railroad of California was covered by the Railway Labor Act, and whether the agreement relied upon was a valid agreement, was resolved by the court. Taking the position that the court had properly held that these antecedent questions of law were proper questions for decision by the court and not the Board, the carrier members stated that, if the underlying dispute were resolved, they would participate in the consideration and decision of the claims submitted to the First Division (Br. of carrier members before C.A. 7).

In its brief as appellee, California, in support of the summary judgment in its favor, stated as part of its statement of contested issues that it also contended that:

a. The Railroad Adjustment Board lacked jurisdiction to hear and determine respondents' claims because the Railway Labor Act was not applicable to a state's relationship with its employees.

b. If the Railway Labor Act were held applicable to the State of California, then the Act was an unconstitutional interference with a state's relationship to its employees.

c. The contract was invalid because the Harbor Board lacked authority to negotiate terms of the contract in conflict with the state constitution and state civil service laws.

d. If the contract were valid and could be enforced, the authority of the Adjustment Board, to decide the instant claims, was precluded by the terms in the contract that a system board—the State Personnel Board—shall hear and decide claims.

e. In any case, the Adjustment Board should not be required to render awards because such awards could not be enforced against the State of California in the federal courts as the Railway Labor Act provides, because of the prohibition of the Eleventh Amendment to the United States Constitution.

These issues had been set forth by California in its brief before the district court (R. 63), and the brief of the State of California as intervening defendant-appellee (pages 3-5). The brief suggested that if the district court were correct in regarding the California court's decision as decisive—that would end the matter. It would fully dispose of the appeal from the summary judgment. If the

court overruled the district court on this point, then the court of appeals would be confronted with the several important issues which had been presented below, but not passed upon (R. 63-65). Then, the court of appeals, itself, could pass them or remand the case to the district court for further decision.

The Seventh Circuit rejected California's contention that the judgment in the *Brotherhoods* case was *res judicata* with respect to the applicability of the Railway Labor Act on the ground that respondents were not parties to the California action and there was no basis in law or fact for holding that the Brotherhoods, of which respondents were members, were authorized to represent respondents in the state court action. Hence, the California decision did not preclude respondent individual members of the Brotherhoods, as far as their individual claims were concerned, from litigating the question of the application of the Railway Labor Act to their claims and the validity of the contract upon which the claims were based (R. 87-88). Thus "Untrammelled by the doctrine of *res judicata*" (R. 89), the Seventh Circuit held that "the Railway Labor Act is applicable to the State Belt Railroad in this case" (R. 89-91). By the same reasoning, the circuit court held that a stipulation in the *Brotherhoods* case to the effect, that the collective bargaining contract had not been approved by the California Department of Finance, was not binding upon respondents (R. 91). Thereupon, the circuit court held, in fact, the contract had been either actually or impliedly approved by that department (R. 93-95).

The Seventh Circuit foreclosed consideration of the other issues pertaining to the jurisdiction of the Adjustment Board. These were the constitutionality of the collective bargaining and enforcement procedures of the Act as applied to a state and the authority of the State Personnel Board as a system board.

The court said that California, in its effort to emphasize the legal basis upon which the summary judgment had been granted, had waived these other contentions because they had not briefed them. The judgment of the district court was reversed with costs, and the case was remanded with instructions to enter a decree granting respondents the relief prayed for (R. 97), that is, the issuance of an injunction to the defendant members of the First Division of the Adjustment Board, and the Executive Secretary of the First Division ordering them to take jurisdiction of the dockets of respondents and to consider, decide them and issue awards thereon in accordance with section 3, First, of the Railway Labor Act (R. 10).

In its petition for rehearing (part of unprinted record), California contended that the Seventh Circuit had incorrectly treated these issues as waived and that California had been deprived of its day in court on them. It asked the circuit court to decide them or remand the case to the district court for decision on the merits (app. pp. 89-94 of pet. for cert.). Rehearing was denied (R. 98). California's petition for certiorari was granted (R. 98).

SUMMARY OF ARGUMENT.

I. No term of the Railway Labor Act refers to a state as the owner and operator of a carrier engaged in interstate commerce. The general terms of a restrictive statute will not be applied to a sovereign state unless there are extraneous and affirmative reasons for believing that Congress intended the statute to apply to a state. This requires an examination of the act in its total environment. All the accepted aids towards this construction, namely, the purpose, subject matter, the evils which the statute was designed to correct, statutes in *pari materia*, the constitutional effects—all conjoin to show that Congress did not intend to impose the collective bargaining and contract enforcing provisions upon a state.

A. The subject matter—the establishment of working conditions through collective bargaining—is universally recognized as being inapplicable to government. The California Supreme Court, when it had the same question before it, declared that for Congress to impose the collective bargaining requirements of the Railway Labor Act upon a state “would constitute an unprecedented interference with a state’s traditional method of fixing the working conditions of its employees” by statute, rather than by contract (*State v. Brotherhood of RR Trainmen* (37 Cal. 2d 412, 419, 232 P. 2d 857, 861)). This Court has also indicated that it will not interpret the general language of a federal statute, concerning the fixing of wages, hours, and working conditions by collective bargaining, as being applicable to government, and that it would require specific language before it would hold that Congress intended

to embark on such a revolutionary program (*U. S. v. United Mine Workers*, 330 U. S. 258, 274).

B. Congress whenever faced with the question of applying labor relations statutes to government employers in interstate commerce has uniformly excluded the United States or the states and their subdivisions from the provisions of the labor relations acts⁷. This represents a uniform congressional policy that a state's employer-employee relationship is not to be controlled by the federal government even where state employees are engaged in interstate commerce, as are the employees of the State Belt. The Railway Labor Act which has been called the "analogue" of the National Labor Relations Act (now the Labor Management Relations Act of 1947) should be construed to carry out the congressional policy so definitely expressed in these other statutes.

C. The purposes of the act—the removal of the company union, by securing full freedom in the choice of collective bargaining representatives, and the prevention of strikes, is also inapplicable to a state (see: *United States v. United Mine Workers*, 330 U. S. 258, 274, concurring op. 328-329).

D. The history of the act gives no indication that state owned carriers were intended to be covered. The act was

⁷National Labor Relations Act, § 2(3), 49 Stat. 450 (1935) as amended by Labor Management Relations Act, 1947, § 101, 61 Stat. 137, 29 U.S.C.A. § 152(2) (1956); Labor Management Relations Act, 1947, § 501(3), 61 Stat. 161 (1947), 29 U.S.C.A. § 142(3) (1956); Fair Labor Standards Act of 1938, § 3(d), 52 Stat. 1060 (1938), 29 U.S.C.A. § 203(d) (1947); War Labor Disputes Act, § 2(d), 57 Stat. 164 (1943), expired by its own terms six months after termination of hostilities, § 10, 57 Stat. 168 (1943).

adopted by Congress as the result of an agreement between the railway brotherhoods and private carriers.

E. There are no necessary implications in this act that it must apply to a state carrier in order that it may fulfill a national plan or achieve nationwide uniformity. The act does not call for nationwide collective bargaining or contracts, nor does it fix generally applicable standards of working conditions.

II. The manner in which Congress has employed the federal judicial power at the instance of private parties, as the cornerstone for enforcement of the act's purposes, clearly indicates that Congress, in the light of the prohibition of the Eleventh Amendment, did not intend to apply the act to a state. Money awards made by the National Railway Adjustment Board, such as those sought against California by respondents, are enforceable at the suit of employees in the federal district courts (§ 3 First (p), 48 Stat. 1191 (1934), 45 U.S.C.A. § 153 First (m) (1954); *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 721). The Adjustment Board is made the exclusive forum for the settlement of disputes concerning the interpretation of existing contracts (*Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239). Again, the obligations concerning the free selection of representatives imposed upon carriers by various provisions of section 2, are primarily to be enforced by suits brought in the federal courts by employees and their representatives (44 Stat. 578 (1926), as amended by 48 Stat. 1187-1189 (1934), 45 U.S.C.A. § 152 (1954); *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548; *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515). The enforceability of arbitration awards

under sections 7 and 8 of the act in the federal courts has been recognized as an "outstanding feature" of the Railway Labor Act. (§ 9, 44 Stat. 585 (1926), 45 U.S.C.A. § 159; see *Texas & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548, 564-565).

Employment of the federal judicial power under the present Railway Labor Act for the effectuation of the act's purposes, contrasts it from earlier legislation concerning railway labor disputes. Yet, this power and the scheme of its use in the act cannot be employed against a state because of the specific limitations of the Eleventh Amendment. As an application to a state of these basic provisions of the act would be impossible, it must be inferred that Congress did not intend to include a state within the scope of the act.

III. To construe the act as applicable to a state would raise serious constitutional questions concerning the power of Congress to require a state to establish terms of employment through collective bargaining.

A. A distinguishing feature of state government is that public office and employment are established and maintained through the acts of state legislatures which exercise continuing discretionary powers over public employment (*Taylor v. Beckham*, 178 U. S. 548, 571). If the Railway Labor Act applies to a state, the California legislature would have to designate state officers to engage fully in collective bargaining with respect to all matters within the collective bargaining scope of the Railway Labor Act. The legislature thereby would be compelled to surrender the continuing discretion over terms of state employment vested in it by the people of the state. Thereupon, govern-

ment by contract, instead of government by law, would be instituted.

B. It is at least doubtful that the federal government can use the commerce power to deprive the states of their fundamental right to establish terms of public employment by statute unless there are supervening reasons of national necessity that the contract method be used.

C. It is suggested that the Court will not interpret the general language of the act to apply to a state, where to do so, would raise serious constitutional questions concerning congressional power. (*N.L.R.B. v. Jones and Laughlin*, 301 U. S. 1, 30).

IV. The cases relied upon by the court below for its holding that the Railway Labor Act applies to a state owned carrier are distinguishable either by the juristic method used or by their factual foundations. *New Orleans Public Belt R. Com'n. v. Ward*, 195 F. 2d (C.A.-5) 829, as did the court below, relied solely upon the broad definition of the term "carrier" in the act. The Seventh and Fifth Circuits failed entirely to consider the purpose, subject matter, and other factors relating to the Railway Labor Act in its total environment. By contrast, *State v. Brotherhoo's* (37 Cal. 2d 412, 232 P. 2d 357) after employing these interpretive aids, reached the conclusion that the act was not applicable to a state. *U. S. v. California* (297 U. S. 175) could find "no convincing reason" why the State Belt should not be subject to the federal Safety Appliance Acts in the same way as a private carrier. The great difference between public and private employment in the collective bargaining field was not involved in *California*.

v. Anglim, 129 F. 2d (C.A.-9) 455, which merely held that the State Belt was subject to the former Carriers' Taxing Act. (50 Stat. 435; 45 U.S.C.A. §§ 261-273.) A result expected. (*South Carolina v. U. S.*, 199 U. S. 437.)

V. A. The jurisdiction of the National Railroad Adjustment Board is limited to the interpretation of disputes growing out of the interpretation of valid existing agreements. (*Brotherhood of RR Trainmen v. Howard*, 343 U. S. 768, 774.) Whether the contract is valid or invalid, is to be determined by California law (*Moore v. Illinois etc. RR Co.*, 321 U. S. 630, *Trans. Air, etc. v. Koppal*, 345 U. S. 653). Under the California civil service system, rates of pay and all terms of employment are fixed by statute or regulation. The Harbor Board completely lacked authority to negotiate the contract upon which respondents' claims before the Adjustment Board are based. As there is no valid existing contract, the Adjustment Board has no jurisdiction to hear and determine respondents' claims. Therefore, the judgment of the court below is erroneous.

1. California cannot be estopped to deny the validity of a contract which the law did not permit the Harbor Board to make.

" ARGUMENT.

I.

THE NATIONAL RAILROAD ADJUSTMENT BOARD LACKS JURISDICTION TO ADJUDICATE RESPONDENTS' CLAIMS BECAUSE THE RAILWAY LABOR ACT UPON WHICH THE AUTHORITY OF THE ADJUSTMENT BOARD IS BASED WAS NEVER INTENDED BY CONGRESS TO CONTROL A STATE'S RELATIONSHIP WITH ITS RAILROAD EMPLOYEES.

The Railway Labor Act (44 Stat. 577 as amended; 45 U.S.C. §§ 151-163⁸) requires all common carriers by railroad, subject to the Interstate Commerce Act, their officers and employees to "... exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce..." (48 Stat. 1186; 45 U.S.C. § 152, amending 44 Stat. 572). Employees have the right to organize and bargain collectively through representatives of their own choosing. Procedures are provided for settlement of major and minor disputes by conference of representatives of employer and employees and failing a solution there, by reference to the National Railroad Adjustment Board, the National Mediation Board or arbitration (44 Stat. 577 (1926), as amended; 45 U.S.C. §§ 152-155, 157 (1952)). Union shop provisions, requiring employees to join the representative union of their craft or class and maintain membership therein, may be included in collective bargaining contracts (64 Stat. 1238 § 2, Eleventh; 45

⁸44 Stat. 577 (1926); 48 Stat. 926 (1934); 48 Stat. 1185 (1934); 49 Stat. 1921 (1936); 54 Stat. 785 (1940); 62 Stat. 909 (1948); 62 Stat. 991 (1948); 63 Stat. 107 (1949); 63 Stat. 880 (1949); 63 Stat. 972 (1949); 64 Stat. 1238 (1951).

U.S.C. § 152 Eleventh (a) amending 55 Stat. 577; *Railway Clerks v. Hanson*, 351 U. S. 225).

If the act is applicable to California, it would require the state to bargain with representatives of its State Belt employees for the purpose of establishing rates of pay and working conditions (*Virginia Ry. v. Federation*, 300 U. S. 515, 548). It would impose duties upon California as an employer with respect to the selection of employee representatives and the state would be subject to fine and its officers to imprisonment and fine for violation of the duties imposed (48 Stat. 1186 Tenth; 45 U.S.C. § 152 Tenth, amending 44 Stat. 577).

The National Railroad Adjustment Board was created in 1934 by amendment to the Railway Labor Act. The amendment represented "a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements" (*Slacum v. Delaware L. & W. R. Co.*, 339 U. S. 239, 243).

The awards made by the Adjustment Board are final and binding upon both parties to the dispute except so far as they contain a money award (48 Stat. 1189 (1934), 45 U.S.C. § 153(m), amending 44 Stat. 577). The money awards sought by respondents here could be enforced by suits brought against California in the federal district courts. In such actions, the findings and orders of the Adjustment Board are "prima facie evidence of the facts therein stated."

The act sets forth the procedures which employers must follow in changing rates of pay, rules or working condi-

tions, requiring 30 days' notice and conference with employee representatives. No changes are effective until final action by the National Mediation Board if the Board offers its services or either party requests them (48 Stat. 1197; 45 U.S.C. § 156, amending 44 Stat. 577 (1926)).

If the scheme of this act is applicable to California with respect to those of its harbor employees who are engaged in the work of the State Belt Railroad, it constitutes in the words of the California Supreme Court an "unprecedented interference with a state's traditional method of fixing the working conditions of its employees. . . ." (*State v. Brotherhoods*, 37 Cal. 2d 419, 232 P. 2d 857, 861).

No term of the act refers to a state or a state owned or operated carrier. The act generally covers all carriers and defines a carrier as "carrier by railroad; subject to the Interstate Commerce Act. . . ." (48 Stat. 1185; 45 U.S.C. § 151 First, amending 44 Stat. 577). That act provides it "shall apply to common carriers engaged in . . . the transportation of passengers and property wholly by railroad" (24 Stat. 379, as amended; 49 U.S.C. § 1). The court below in holding that the Railway Labor Act applied to a state carrier argued that the act provided a "functional test only" (*Taylor v. Fee*, 233 Fed. 2d C.A.-7, 251, 255). "Whether the railroad is owned by a private carrier or a State" is not part of the test (R. 90). Furthermore, the term "carrier" is defined "in such broad terms"⁹ as to include a railroad engaged in interstate commerce and owned by a State." (R. 91). But when it is argued that Congress intended to impose

⁹Emphasis ours unless otherwise indicated.

"unprecedented" control over a state's employer-employee relationship; the words "carrier by railroad" can not be taken "quite so simply" (*United States v. United Mine Workers*, 330 U. S. 258, 309; concurring opinion).

The federal Safety Appliance Act (45 U.S.C. 51) also uses the words "every common carrier by railroad." This could also be described as a functional test rather than one depending upon the identity of the operator. But, when *United States v. California*, 297 U. S. 175, was here, the Court had before it the question of applying that general term to California as the operator of the same State Belt Railroad. It was assumed that the State Belt was subject to the Interstate Commerce Act (297 U. S. at pp. 186-187). Rather than summarily applying a "functional test" or relying upon the general term "carrier by railroad," this Court found it necessary to interpret the statute in the light of the old and well-settled rule that statutes, which in general terms, divest pre-existing rights and privileges will not be applied to the sovereign without express words to that effect (citing *Guarantee Title & Trust Co. v. Title Guaranty Surety Co.*, 224 U. S. 152, 155-156; *United States v. Herron*, 20 Wall. 251, 263; *United States v. Stevenson*, 215 U. S. 190, 197); unless there are "extraneous and affirmative reasons for believing that the sovereign should also be deemed subject to a restrictive statute . . ." (*United States v. Mine Workers*, 330 U. S. 258, 272-273; *United States v. California*, 297 U. S. 175, 186).

In holding that Congress intended to include state carriers within the operation of the federal Safety Appliance Act, the court first looked at the act's purpose which

was to "protect employees and the public from injury because of defective railway appliances . . . and to safeguard interstate commerce itself from obstruction and injury due to defective appliances," etc. (*United States v. California*, supra, at 185). "The danger to be apprehended," Mr. Justice Stone said, was "as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned" (297 U. S. at 185). The remedy was uniform safety appliances throughout the national railroad system. "No convincing reason" could be advanced why safety appliances should not be required on state-owned carriers as provided by the act which was "all embracing in scope and national in its purpose" (297 U. S. at 185).

Again, when this Court held that the general term "person" would be construed to include California as the public owner of wharves and piers at San Francisco Harbor with respect to the rate making authority of the United States Maritime Commission, under the Shipping Act of 1916, as amended (49 Stat. 1518; 46 U.S.C. 815) the Court stated that the "crucial question" was whether the statute read in the light of the circumstances which gave rise to its enactment and for which it was designed, applied also to public owners of wharves and piers (*California v. United States*, 320 U. S. 577, 585).

A similar interpretive technique was used in *United States v. Mine Workers*, 330 U. S. 258, holding that the general term "employer" in the Norris-La Guardia Act (47 Stat. 70, 29 U.S.C. 101) was not applicable to the government as an employer. This Court said "... we cannot construe the general term 'employer' to include the United

States; when there is no express reference to the United States and *no evident affirmative grounds for believing that Congress intended* to withhold an otherwise available remedy from the Government . . .” (330 U. S. at 270). *Parker v. Brown*, 317 U. S. 341, refused to apply the general language “person” in the Sherman Anti-Trust Act to California with respect to the state’s control of the interstate marketing of agricultural products under the California Agricultural Prorate Act. Noting that the Sherman Act did not refer to state action, the court said

“In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.” (p. 351)

The Seventh Circuit, on the other hand, failed entirely to follow the lead of this Court, as suggested in *United States v. California*; *California v. United States*; *United States v. Mine Workers*, and *Parker v. Brown*, *supra*, with respect to applying the general language of the Railway Labor Act to a state-owned carrier. Particularly should this have been done, when the court had before it an entirely new concept—that Congress would attempt to use the commerce power to regulate a state’s employer-employee relationship. It was not enough to say that because other interstate railroad commerce statutes, dealing with other phases of that commerce and imposing different types of control, had been interpreted as applying to the State Belt, that the Railway Labor Act *ipso facto* applied. Each general statute, alleged to include the government, presents its own unique problem of interpretation.

Petitioner submits that a consideration of the purposes, subject matter, history, constitutional aspects, and the terms of the Railway Labor Act in its total environment will clearly demonstrate that Congress never intended the general language of the act to apply to a state-operated carrier.

A. THE SUBJECT MATTER OF THE RAILWAY LABOR ACT—COLLECTIVE BARGAINING TO ESTABLISH THE RATES OF PAY AND WORKING CONDITIONS BY CONTRACT—IS NOT REFERABLE TO A STATE.

The very subject matter—establishing working conditions through collective bargaining, particularly in 1926, when the Railway Labor Act was enacted (*Virginian Ry. Co. v. Federation* (300 U. S. 515, 542)), is foreign to a state. Congress must be given credit for knowing that public agencies traditionally establish the rights and privileges of their employees by statute and regulate them through the legislative process—not through contract. As the California Supreme Court points out (*State v. Brotherhood, etc.*, 37 Cal. 2d 412, 419, 232 P. 2d 857), “Many of the purposes stated in the Railway Labor Act are similar to some of the purposes of the *Norris-La Guardia Act*” (47 Stat. 70, 29 U.S.C. §§ 101-115). In *United States v. United Mine Workers*, 330 U.S. 258, 274, this Court said:

“The purpose of the [Norris-La Guardia] Act is said to be to contribute to the worker’s ‘full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the

designation of such representatives . . . for the purpose of collective bargaining . . . ' ' ' at p. 274. (cf., Railway Labor Act, (44 Stat. 577, as amended, 45 U.S.C. § 151(a)).

The court concludes "These considerations on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees" (330 U. S. at 274).

In a separate concurring opinion, Mr. Justice Black and Mr. Justice Douglas declared:

"Congress never in its history provided a program for fixing wages, hours, and working conditions of its employees by collective bargaining. Working conditions of Government employees had not been the subject of collective bargaining, nor been settled as a result of labor disputes. It would require specific congressional language to persuade us that Congress intended to embark upon such a novel program or to treat the Government employer-employee relationship as giving rise to a 'labor dispute' in the industrial sense." (330 U. S. at 328-329).

A forceful statement of the characteristics distinguishing public from private employment appears in a letter from President Franklin D. Roosevelt to the National Federation of Federal employees on August 16, 1937:

"All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully

or to bind the employer in mutual discussions with Government employee organizations. *The employer is the whole people, who speak by means of laws enacted by their representatives in Congress.* Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters" (Quoted in *City of Springfield v. Clouse*, 206 S. W. 2d (Mo.) 539, 542-543; and *C.I.O. v. City of Dallas*, 198 S. W. 2d (Tex.) 143, 144-145).

The authorities are replete with statements and illustrations of policy demonstrating that the establishment of wages and working conditions by contract is not characteristic of the Federal and state governments. *City of Springfield v. Clouse*, 356 Mo. 1239, 4251, 206 S. W. 2d 539, 545; *Miami Water Works Local No. 654 v. City of Miami*, 157 Fla. 445, 450, 26 So. 2d 194, 195; *Mugford v. Mayor and City Council of Baltimore*, 185 Md. 266, 270-271, 44 A. 2d 745, 746-747; *Hagerman v. City of Dayton*, 147 Ohio 313, 329, 71 N. E. 2d 246, 253, 254; *Railway Mail Assn. v. Murphy*, 180 Misc. 868, 44 N. Y. Supp. 2d 601. These authorities point out that wages and working conditions are fixed by statute—not contract and that public officials are without authority to collectively bargain concerning these matters. This is the law of collective bargaining in California (*State v. Brotherhood of RR Trainmen*, 37 Cal. 2d 412, 417-418, 232 P. 2d 857, 860-861; *City of Los Angeles etc. v. Los Angeles etc. Council*, 94 Cal. App. 2d 36, 43-47, 210 P. 2d 305, 310-313; *Nutter v. City of Santa Monica*, 74 Cal. App. 2d 292, 297-298, 168 P. 2d 741, 745).

As a consequence, statutes which, in general terms, provide for collective bargaining by employers and em-

ployees and the protection of that right, are construed as not applicable to the state and its political subdivisions (Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 168 P. 2d 741; Petrucci v. Hogan, 27 N. Y. S. 2d 718, 723; Jewish Hospital of Brooklyn v. Doe, 300 N. Y. Supp. 1111 (and cases cited above)).

As the New York Court of Appeals said in *Railway Assn. v. Corsi*, (56 N. E. 2d (N. Y.) 721 (affirmed 326 U. S. 88)):

"... the terms and conditions of employment of civil service employees of the Post Office and of other departments or agencies of the Federal, State, or City government must be fixed by governmental authority and not by collective bargaining." (p. 723.)

This view, in general, was endorsed here (326 U. S. 88, 95). Consequently, when the question of the application of the Railway Labor Act to the State Belt was before the California Supreme Court, the Court said, referring to the above cases:

"It is most significant that, while one of the major purposes of the Railway Labor Act is to secure the right of employees to bargain collectively with their employer with respect to rates of pay, rules, and working conditions, the terms and conditions of government employment are traditionally fixed by legislation and administrative regulation, not by contract." (*State v. Brotherhoods*, 37 Cal. 2d 412, 416-417, 232 P. 2d 857, 860.)

B. ALL OTHER FEDERAL LABOR RELATIONS STATUTES EXPRESSLY EXCLUDE THE STATES.

The Railway Labor Act was enacted in 1926 as the first of Congressional Acts imposing upon employers en-

gaged in interstate commerce, the obligation to bargain collectively with representatives of their employees. In this legislative field, it was the forerunner of the National Labor Relations Act of 1935 (49 Stat. 449, as amended, 29 U.S.C. §§ 151, 152 (2) and the Labor Management Relations Act of 1947 (61 Stat. 136, 161; 29 U.S.C. 141, 142(3)). These acts, as does the Railway Labor Act, declare that the failure of employers to collectively bargain and to settle disputes peaceably, leads to strikes and other forms of industrial strife which obstruct or tend to obstruct commerce. This Court has characterized the collective bargaining provisions of the Railway Labor Act as the "analogue" of similar provisions in the National Labor Relations Act (now the Labor Management Relations Act 1947), and has made parallel interpretations of sections of the two acts (*National Labor Relations Board v. Jones and Laughlin etc. Corp.*, 301 U.S. 1).

The Labor Management Relations Act provides (as did the National Labor Relations Act, sec. 2(2), 49 Stat. 450, 29 U.S.C. 152(2)) that

"The term 'employer' . . . shall not include the United States . . . or any State or political subdivision thereof . . . or any person subject to the Railway Labor Act. . . ." (sec. 2(3), 61 Stat. 161, sec. 2(2) 137, 29 U.S.C. 152(2)).

Because of the exclusion of the states in the federal labor relation acts, California is not required to collectively bargain with representatives of its other employees (some 425 (R. 54)) engaged upon non-railroad work of the San Francisco Harbor although they are also engaged in interstate commerce (*Oxnard Harbor District*,

34 N.L.R.B. 1285 (1941); *Mobile Steamship Assn. etc.*, 8 N.L.R.B. 1297, 1318 (1938)).

The War Labor Disputes Act of 1943 (57 Stat. 163, 50 U.S.C. 1501-11, (expired 6 months after termination of World War II, sec. 10), designed to prevent labor disputes interfering with the war effort, also excluded the federal and the state governments from the definition of "employer".

The Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. 201-19) designed to prevent sub-standard wages and working conditions for employees in interstate commerce (sec. 2) also excludes the federal government and the states as employers:

" 'employer' . . . shall not include the United States or any State or political subdivision of a State . . ."
(sec. 3, 52 Stat. 1060, as amended, 29 U.S.C. 203(d)).

These statutes bespeak "a uniform congressional policy that the relationship between a state and its employees is not to be controlled by the federal government even where those employees are engaged in interstate commerce." (*State v. Brotherhoods*, 37 Cal. 2d 412, 418, 232 P. 2d 857, 861; *Nutter v City of Santa Monica*, 74 Cal. App. 2d 292, 298, 168 P. 2d 741, 745).

A further indication that Congress, up to the present, does not wish to dictate to the states concerning their relationship with their employees, is found in section 9 of the Universal Military Training and Service Act, which, generally, requires that private employers must reemploy former employees when they return from military service (sec. 9(b) (B), 62 Stat. 614-615, 50 U.S.C.A. App. § 459(b)).

(B)). However, if the employee was "in the employ of any State or political subdivision thereof", Congress, with due regard for the unique position of the states as employers, provided that "it is hereby declared to be the sense of the Congress" that a person who has performed military service should be restored to the position he occupied before entering military service (sec. 9(b) (C), 62 Stat. 614-615, 50 U.S.C.A. App. § 459(b) (C)). Significantly, Congress, in control of its own personnel matters, makes it obligatory upon agencies of the federal government to reemploy (sec. 9(b) (A), 62 Stat. 614-615, 50 U.S.C.A. App. § 459(b) (A)).

1. **The Railway Labor Act should be construed to carry out the Congressional policy so definitely expressed in all other statutes concerning labor relations in interstate commerce.**

The Railway Labor Act should be construed in consonance with the congressional policy made so clearly evident in the other acts regulating labor matters in interstate commerce (*State v. Brotherhoods*, 37 Cal. 2d 412, 418, 232 P. 2d 857, 861). "When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject" (*Tiger v. Western Investment Co.*, 221 U.S. 286, 309).

In *Petrucchi v. Hogan*, 27 N.Y.S. 2d 718, and *Jewish Hospital of Brooklyn v. Doe*, 300 N.Y.S. 1111, the provisions of the New York Civil Practice Act restricting the issuance of injunctions in labor disputes were held to be in *pari materia* with the New York State Labor Relations Act (N.Y. Law 1937, ch. 443, N.Y. Labor Law sec. 700 et seq.). Because this latter act excluded the state and its political subdivisions in the same way as the Federal

acts, it was held that the general language of the New York Civil Practice Act was not intended to apply to a state or its political subdivisions (*Jewish Hospital of Brooklyn v. Doe*, supra, pp. 1118-1119).

C. THE PURPOSES OF THE ACT ARE NOT REFERABLE TO STATE EMPLOYMENT.

A prolific source of disputes in the railroad industry "had been the maintenance by the railroads of *company* unions and the denial by railway management of the authority of representatives chosen by their employees" (*Virginian Ry. Co. v. Federation*, 300 U.S. 515, 545, Railway Labor Act, General Purposes, sec. 2, 44 Stat. 577, 45 U.S.C. 151a).

Referring to a similar purpose in the Norris-La Guardia Act to afford full freedom in the choice of representatives for the purpose of collective bargaining, this Court said:

"These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees" (*United States v. United Mine Workers*, 330 U.S. 258, 274).

In fact, a large number of the states, although necessarily excluding themselves as employers, have provided for collective bargaining with respect to intrastate employment in consonance with the federal labor relations policy (for example: N. Y. Labor Law, McKinney's Consol. Laws, ch. 31, art. 20; California Labor Code sec. 921-923).¹⁰

¹⁰With respect to the purpose of the act "to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of em-

As pointed out in *Virginian Ry. Co. v. Federation*, 300 U.S. 515, the main purpose of the Railway Labor Act (sec. 2, 44 Stat. 577, as amended, 45 U.S.C. 151(a)) was to prevent strikes and other tactics which would interrupt the free flow of interstate railway commerce by providing procedures for the peaceable settlement of labor disputes (300 U.S. at p. 542).

Up to the present time, at least, strikes by public employees against public agencies to compel them to establish terms of public employment by collective bargaining, have been regarded as illegal and, being for an unlawful purpose, may be enjoined: (See *United States v. United Mine Workers*, 330 U.S. 258, 273-274; *City of Los Angeles v. Los Angeles etc. Council*, 94 Cal. App. 2d 36, 47-49, 210 P. 2d 305, 311-313, and authorities cited; *Teller Labor Disputes and Collective Bargaining*, 1940 ed., 1947 Cum. Supp. Vol. 1, sec. 171, pp. 113-119).¹¹ Strikes against the federal government are now specifically made unlawful by statute (sec. 305, 61 Stat. 160, 29 U.S.C. 188) although the right to strike is generally recognized as lawful (61

ployees to join a labor organization," (48 Stat. 1186 (1934), 45 U.S.C. 151a(2), amending 44 Stat. 577 (1926)), no question has arisen concerning the right of the State employees engaged upon the work of the State Belt to be members of their respective Brotherhoods nor of the right of the officers of the respective Brotherhoods to present matters involving working conditions generally to the San Francisco Harbor Board or to the State Personnel Board (*State v. Brotherhood of RR Trainmen*, 31 Cal.2d 412, 417, 232 P.2d 857, 861; *Nutter v. City of Santa Monica*, 74 Cal.App.2d 292, 294, 168 P.2d 741, 743; *City of Los Angeles v. Los Angeles etc. Council*, 94 Cal.App.2d 36, 210 P.2d 305).

¹¹As President Franklin D. Roosevelt said, in the letter to the National Federation of Federal Employees: "Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of government employees. . . ."

Stat. 151 (1947), 29 U.S.C. 163 amending 49 Stat. 457 (1935)).

The oppression of labor by refusal of private carriers to improve working conditions was not characteristic of state employment (*Nutter v. City of Santa Monica*, 74 C.A. 2d 292, 297-298, 168 P. 2d 741-744). In fact, the states have been in the forefront of the effort to improve the position of labor and working conditions and have encouraged that improvement by example (Gov. Code secs. 18500, 18850, 18853; *Terminal RR. Assn. v. Brotherhood of RR. Trainmen*, 318 U.S. 1, 7).

D. THE HISTORY OF THE ACT INDICATES THAT ONLY PRIVATE CARRIERS WERE TO BE WITHIN ITS COVERAGE.

State v. Brotherhoods (37 Cal. 2d 412, 419-420, 232 P. 2d 857, 862-863, app. 30-31) thoroughly examined the history of the act and could find no indication that state owned carriers were intended to be covered. In fact, there is the affirmative historical evidence that the Railway Labor Act was accepted and enacted by the President and Congress as an agreement between the railroad brotherhoods and private carriers (67 Cong. Rec., 4504-4505, 4524, 4583, 4652, 8807; *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 753, dissent by Frankfurter, J.).

E. THERE IS NO NECESSARY IMPLICATION THAT A STATE AS A COMMON CARRIER MUST BE SUBJECT TO THE ACT IN ORDER TO CARRY OUT A NATIONAL PLAN OR ACHIEVE NATION-WIDE UNIFORMITY FOR RAILROAD CARRIERS IN INTERSTATE COMMERCE.

Often courts will construe general language to include public agencies where to exclude them would make an exception in a national plan of regulation or would destroy

uniformity. For example, in *United States v. California* 297 U.S. 175, wherein the federal Safety Appliance Act (27 Stat. 531 as amended; 45 U.S.C. §§ 1-46) was found applicable to the State Belt, the Court recognized that, to exclude the State Belt, would impair the uniformity sought by Congress to have uniform safety appliances used throughout the nation's railroad system for the purpose of protecting employees and the traveling public. No reason could be suggested why a state, as a railroad carrier, should not comply with a statute "all embracing in scope and national in purpose" (297 U.S. at 185). But such compulsive implications are not present here. The act does not provide for nation-wide collective bargaining, procedures or contracts. Each carrier may make its own contract or none at all (*Virginian Ry. Co. v. Federation*, 300 U.S. 515, 548)! The act "does not fix and does not authorize anyone to fix generally applicable standards for working conditions"; nor has Congress preempted the field of regulating working conditions for interstate railroad commerce (*Terminal RR. Assn. v. Brotherhood of RR. Trainmen*, 318 U.S. 1, 6-7). This lack of a need for uniformity in the Railway Labor Act distinguishes, in part, the other cases relied upon by the Seventh Circuit and by respondents, namely: *Maurice v. California*, 43 Cal. App. 2d 270, 110 P. 2d 706, holding the State Belt subject to the Federal Employers' Liability Act . . . (35 Stat. 65 as amended, 45 U.S.C. §§ 51-60); *California v. Anglim*, 129 F. 2d (C.C.A. 9) 455: finding the State Belt was subject to the federal Carriers' Taxing Act (50 Stat. 435, 45 U.S.C. §§ 261-273). Obviously, when establishing rules of tort liability in the Federal Employers'

Liability Act (35 Stat. 65, as amended, 45 U.S.C. §§ 51-60) Congress intended to provide uniform rules applicable to all employees engaged in interstate commerce, in light of the particular hazards of railroad employment. Toward this end, Congress has so closely allied the Safety Appliance Acts with the Federal Employers' Liability Act that the former acts "cannot be regarded as statutes wholly separate from and independent of the Federal Employers' Liability Act" (*Urie v. Thompson*, 337 U.S. 163, 189).

The imposition of a payroll tax by the former Carriers' Taxing Act of 1937 (50 Stat. 435, for subsequent history of act, see historical note, 45 U.S.C.A. §§ 261-273 (1954)) upon a state as a carrier, and employees of the State Belt, was found to be within the intention of Congress, because of the national interest in retaining trainmen in the national railroad system through the granting of pensions without relation to the particular railroad upon which they might be engaged (*State of California v. Anglim*, 129 F. 2d (C.A.-9) 455, 459, *cert. den.* 317 U.S. 669). In fact, the tax could have been imposed regardless of whether or not the State Belt was engaged in interstate commerce (*Helvering v. Powers*, 293 U.S. 214; *New York v. United States*, 326 U.S. 572).

II.

THE ENFORCEMENT AND ADJUDICATING PROCEDURES OF THE ACT REST UPON THE EXERCISE OF THE JUDICIAL POWER OF THE UNITED STATES AT THE INSTANCE OF PRIVATE PARTIES AND INDICATE THAT APPLICATION OF THE ACT TO A STATE WAS NOT INTENDED.

The obvious handicap which the Eleventh Amendment imposes upon the effective enforcement of the Railway Labor Act against a state affords significant support for the proposition that Congress should not be presumed to have intended the act to apply to a state-owned and operated carrier.

The Eleventh Amendment effectively withdraws from the cognizance of the judicial power of the United States suits in law or equity brought against a state without its consent by any party other than the United States or another state (*Ford Motor Co. v. Department of Treasury of Indiana*, 323 U. S. 459; *Monaco v. Mississippi*, 292 U. S. 313, 329; *Ex parte New York*, 256 U. S. 490; *Duhne v. New Jersey*, 251 U. S. 311, 313; *Smith v. Reeves*, 178 U. S. 436; *Hans v. Louisiana*, 134 U. S. 1).

The language, the legislative history, and the construction placed upon the Railway Labor Act by this Court in numerous decisions clearly demonstrates a congressional reliance upon judicial enforcement by the federal courts at the instance of private parties as a device for effectuating the purposes of the act. To the extent to which Congress contemplated the availability of the federal judicial power as the key to the inadequacies of the Transportation Act of 1920 and to the anticipated efficacy of the Railway Labor Act, it must be assumed that Congress

did not and could not reasonably have supposed an application of the latter statute to a state.

This Court has repeatedly emphasized that the imposition by the Railway Labor Act of legally enforceable obligations upon the parties to railway labor disputes is a salient feature of that act as compared with the earlier federal statutes respecting railway labor relations (see, e.g., *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 560-567; *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 542-549; *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323, 328-332; *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 720-721, 725-728, *aff'd on reh.*, 327 U. S. 661). Proof of the congressional reliance upon an exercise of the federal judicial power for the instrumentation of the Railway Labor Act may be found in an analysis of a few basic situations.

A. THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES ARISING UNDER EXISTING CONTRACTS RESTS ULTIMATELY UPON AN EXERCISE OF THE FEDERAL JUDICIAL POWER.

The act anticipates the employment of the judicial power of the United States as an integral part of the congressional scheme for the resolution of disputes arising under existing contracts. Disputes between employees and carriers growing out of grievances or disputes arising under existing agreements must first be subjected to private negotiation between the parties. In the event an adjustment of the dispute is not reached by such negotiation, the matter may be referred by petition of either or both of the parties to the appropriate division of the Adjustment Board (§ 3 First (i), 48 Stat. 1191 (1934), 45 U.S.C.A. § 153 First (i) (1954)). The division of the

Adjustment Board affords a hearing to the parties to the dispute and the entire division, sitting if necessary with an impartial referee to break deadlocks, makes a final award (§ 3 First (j), (k) and (l), 48 Stat. 1191 (1934), 45 U.S.C.A. § 153 First (j), (k) and (l) (1954)). The act declares that an award is "final and binding upon both parties to the dispute," except to the extent that it contains a money award (§ 3 First (m), 48 Stat. 1191 (1934), 45 U.S.C.A. § 153 First (m) (1954)). In the event that the award is in favor of the employee, the Adjustment Board division makes an order directing the carrier to make the award effective. The order may include a requirement that the carrier pay money to the employee if he is so entitled under the award (§ 3 First (o), 48 Stat. 1192 (1934), 45 U.S.C.A. § 153 First (o) (1954)).

The award is enforceable by the employee by suit in a United States district court. In such a proceeding the findings and order of the division of the Adjustment Board making the award are prima facie evidence of the facts stated therein. The district courts are empowered to make such orders and enter such judgments, by mandamus or otherwise, as are necessary to enforce or set aside the order of the division of the Adjustment Board. In an enforcement suit in the district court the employee enjoys procedural advantages in addition to the prima facie value accorded to the award itself. He is not liable for costs and if he prevails he may recover his reasonable attorney's fee (§ 3 First (p), 48 Stat. 1192 (1934), 45 U.S.C.A. § 153 First (p)).

Although the procedure provided by the act for the adjustment of disputes arising under existing contracts

may superficially be regarded as occurring in three stages, it should be apparent that Congress contemplated but one integrated process. The provision for enforcement of an award by suit in a federal district court cannot be regarded as a severable proceeding, separate and apart from the other provisions of the act. The conferral by the act of jurisdiction on various divisions of the Adjustment Board to hear disputes arising from existing agreements is exclusive of any other means of obtaining an adjudication of such disputes. Although an employee may pursue a common law remedy in certain instances (*Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, 634-636), a carrier may not submit disputes under existing contracts for adjudication in any other forum, state or federal (*Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239; *Order of Conductors v. So. R. Co.*, 339 U. S. 255; *Order of Conductors v. Pitney*, 326 U. S. 561). Moreover, once an award has been rendered by a division of the Adjustment Board, the losing party in the Adjustment Board proceeding appears to be totally unable to gain judicial review except, perhaps, where the award directs the payment of money (see *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 760-761, dissent by Frankfurter, J.). Finally, the prima facie weight accorded to the order by the federal courts, and; indeed, the very fact that the award itself gives rise to a cause of action on the part of an employee, indicates that the Adjustment Board proceeding is an adjudication having substantial legal consequences.

There has been no better analysis of the intertwined relationship between the various stages of the procedure provided by section 3 of the act for the resolution of dis-

putes arising from existing contracts than that of the United States Court of Appeals for the District of Columbia in *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, 242-243, *aff'd. by an equally divided Court*, 319 U. S. 732. The Court of Appeals analyzed what it termed the "basic, progressive and integral structure of the statute".

If any qualifications in the cited analysis of the Court of Appeals are dictated by the decisions of this Court, they are in the direction of strengthening the emphasis upon the legally significant nature of the obligations created by an award of the Adjustment Board (see, *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 721, 725-728).

We do not deem it necessary for present purposes to identify with precision the point at which the grip of the federal judicial power is first exerted in this process of dispute adjudication. Certainly, the Eleventh Amendment forbids the initiation of an enforcement suit against a state in the federal district court. It might even be asserted that the judicial power takes its bite against the carrier before that stage because of the procedural and substantive advantages accruing to an employee in his enforcement suit by virtue of the Adjustment Board decision. Moreover, in a broader sense, the conferral of exclusive jurisdiction on the board and the consequent deprivation to the carrier of recourse to other forums is in a sense an exercise of judicial power. In any event, an elaborate attempt to identify the exact stage at which the federal judicial power may be first deemed exerted diverts attention from the fundamental point. The effectiveness of the entire statutory process for the adjustment

of minor disputes rests *ultimately* upon an exercise of the judicial power of the United States at the instance of a private party. That power may not be exercised against a state and, it being apparent that in the congressional contemplation the entire process was an integrated one, the conclusion is inescapable that Congress could not have anticipated an application of this plan to a state acting as a carrier.

B. CONGRESS CONTEMPLATED THAT MANY OF THE OBLIGATIONS IMPOSED UPON CARRIERS BY SECTION 2 WOULD BE EFFECTIVE BY ENFORCEMENT IN THE FEDERAL COURTS AT THE INSTANCE OF PRIVATE PARTIES.

As originally enacted in 1926, section 2 Third of the act guaranteed to employees the right to select their bargaining representatives without employer interference or influence (44 Stat. 578 (1926), 45 U.S.C.A. § 152 Third (1954)). The enforceability of this right by judicial process was questioned by the carrier in *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548. After reviewing the history of congressional legislation with reference to railway labor disputes and decisions construing Title III of the Transportation Act of 1920 (41 Stat. 469 (1920), repealed by Railway Labor Act, § 14, 44 Stat. 587 (1926), 45 U.S.C.A. § 163 (1954); see, e.g., *Penna. R. R. v. Labor Board*, 261 U. S. 72; *Penna. Federation v. P. R. R. Co.*, 267 U. S. 203), the Court concluded that in the Railway Labor Act Congress intended to impose certain definite obligations upon the parties to railway labor disputes and that Congress anticipated the enforcement of these obligations by the federal courts (*Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 560-670).

"It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. (*Texas & N. O. R. Co. v. Ry. Clerks*, *supra* at 567).

"As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." (*Texas & N. O. R. Co. v. Ry. Clerks*, *supra* at 569).¹⁰

The conclusion that Congress contemplated the availability to the parties to disputes of appropriate judicial remedies to secure the rights conferred by the statute has been the foundation of the subsequent treatment of the act in the courts.

The requirement in section 2 Ninth, that a carrier "treat with the representative" certified by the Mediation Board in the event of a dispute as to the identity of the representative was held enforceable by judicial remedy at the instance of the employee representative in *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515. As in the *Railway Clerks* case, *supra*, the Court emphasized that an intention to fortify the machinery for voluntary adjustments of labor disputes by calling upon the judicial powers of the federal courts marked the congressional attitude reflected in the Railway Labor Act as

¹⁰By the addition in 1934 of section 2 Tenth, Congress prescribed criminal penalties for a carrier's failure to comply with the requirements of section 2 Third, Fourth, Fifth, Seventh, and Eighth (48 Stat. 1189 (1934), 45 U.S.C.A. § 152 Tenth).

distinguished from the spirit of Title III of the Transportation Act of 1920.

“The policy of the Transportation Act of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was, as we have seen, abandoned by the enactment of the Railway Labor Act. Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the *Brotherhood of R. & S. S. Clerks Case*, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427, *supra*; lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction” (*Virginian Ry. Co. v. System Federation No. 40*, *supra* at 545).

C. ARBITRATION PURSUANT TO SECTIONS 7 AND 8 OF THE ACT CULMINATES IN AN AWARD ENFORCEABLE BY THE FEDERAL COURTS.

Sections 7 and 8 of the act provide statutory machinery for the arbitration of labor disputes not subject to settlement by conference between the parties or by resort to the Adjustment Board or mediation (44 Stat. 582-585 (1926); 45 U.S.C.A. §§ 157 and 158 (1954)). Though the initial resort to arbitration is a voluntary act by the parties, the arbitration award is declared by section 9 to be conclusive and binding upon the parties as to the merits and facts in the controversy and is enforceable in the federal district court (44 Stat. 585 (1926), 45 U.S.C.A. § 159).

The significance of section 9 is emphasized in the following comparison drawn by this Court in *Texas & N. O.*

R. Co. v. Ry. Clerks, 281 U. S. 548, 564-565, between arbitration under Title III of the Transportation Act of 1920 and under the Railway Labor Act:

"While adhering in the new statute to the policy of providing for the amicable adjustment of labor disputes, and for voluntary submissions to arbitration as opposed to a system of compulsory arbitration, Congress buttressed this policy by creating certain definite legal obligations. The outstanding feature of the Act of 1926 is the provision for an enforceable award in arbitration proceedings. . . . Thus it is contemplated that the proceedings for the amicable adjustment of disputes will have an appropriate termination in a binding adjudication, enforceable as such."

**D. CONGRESSIONAL INTENT TO EXCLUDE STATES
MUST BE INFERRED.**

Did Congress intend that the relationships between a State and those whom it employs in its operation of a railroad be subject to the provisions of the Railway Labor Act? The general language employed in defining the coverage of the act affords no conclusive answer to the question. Moreover, an examination of the legislative history of the act discloses no direct expression on the question. In all probability, if reality be admitted, Congress did not consciously address itself to the problem and the congressional "intention" to which deference is to be given is subjunctive only. What Congress *would* have intended, had it considered the question, may appropriately be deduced either from factors which are known to have been within the congressional contemplation or from factors which it may reasonably be presumed would

have influenced Congress had their relevance become apparent. In a sense, congressional "intention," in its application to specific problems not expressly dealt with by Congress as such, must be derived from the "mood" of Congress (cf. *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 487). Such an analytical technique is appropriate in the present case.

Congressional intention with respect to the present problem was not directly manifested in the act. Yet it is clear that Congress, by its enactment of the Railway Labor Act, made two conscious decisions which are of fundamental importance to the solution of the instant problem. First, Congress seized upon the judicial power of the United States as the instrument with which to overcome the deficiencies in its earlier enactments touching upon railway labor disputes and to insure the effectiveness of the act as "an instrument of government" (see *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 751, dissent by Frankfurter, J.). Second, it chose to rely principally upon the initiative of the private parties to railway labor disputes as the stimulus which would call the federal judicial power into action. The act clearly contemplates that the judgments and orders of the federal courts are to be rendered at the instance of and in favor of private parties rather than the United States Government itself.

The third factor which must be considered in any attempt to hypothecate the intent of Congress on the application of the act to a state is the impact of the Eleventh Amendment. The amendment imposes a specific and paramount limitation upon the powers of the federal govern-

ment (cf. *Smith v. Reeves*, 173 U.S. 436, 445-446). It must be presumed that Congress was aware of this fundamental constitutional limitation upon its powers.

The Eleventh Amendment forbids the employment against a State of the very device upon which Congress relied in its attempt to fashion in the Railway Labor Act a more effective instrument of railway government than the voluntary procedures which had been previously employed. That device was the creation of affirmative legal obligations enforceable in the federal courts at the instance of private parties. It is self evident that this is a device which Congress could not have made applicable to a state. Hence it must be presumed that Congress did not intend an application of the Railway Labor Act to a rail carrier owned and operated by a state.

III.

TO CONSTRUE THE RAILWAY LABOR ACT AS APPLYING TO A STATE WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

A. A FUNDAMENTAL ATTRIBUTE OF STATE SOVEREIGNTY IS THE RIGHT OF A STATE TO ESTABLISH THE TERMS UPON WHICH ITS EMPLOYEES WILL CARRY OUT STATE FUNCTIONS.

One of the fundamental attributes of state sovereignty is the right to select and control the employees who carry out state functions. A sovereign state carries out its functions and personifies itself through its officers and employees. It has been said that the distinguishing feature of a republican form of government, which the central gov-

ernment is constitutionally bound to guarantee (U. S. Const., Art. IV, sec. 4), is the "right of the people to choose their own officers for governmental administration . . ." (*In re Duncan*, 139 U.S. 449, 461; see *Kotch v. River Port Pilot Com'rs.*, 330 U.S. 552, 557). "It is obviously essential to the independence of the States . . . that their power to prescribe the qualifications of their own officers, the tenure of their offices . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." (*Taylor v. Beckham*, 178 U.S. 548, 570-571; *Snowden v. Hughes*, 321 U.S. 1, 11-13).

One of the proper functions of the states is the power and authority to develop harbors (*Com'r. v. Ten Eyck*, 76 F. 2d (C.A. 2d) 515, 518), and, as Mr. Justice Holmes pointed out in *Sherman v. United States*, 282 U.S. 25, this authority of the state includes the operation of the State Belt—"a State prerogative" p. 29).

The way in which the Railway Labor Act would control and interfere with the right of California as a sovereign state to regulate its relationship with its State Belt employees has already been described.

Essentially, California would be required to negotiate in good faith for the purpose of making a collective agreement concerning rates of pay, rules, and working conditions (sec. 2 First, 44 Stat. 577, as amended, 45 U.S.C.A. § 152, First; *Virginian Ry. Co. v. Federation*, 300 U.S. 515, 548). The present alleged contract is void. There is a complete absence of authority in the Harbor Board to make a contract concerning wages and working conditions for State Belt employees. Hence, assuming that the Railway

Labor Act is applicable to California and supervenes the provisions of the California Constitution (Art. XXIV, app. 74) and the implementing provisions of the California Civil Service Act (Calif. Gov. Code sec. 18500, app. 76), there would have to be a State agent with authority to make a binding contract for the State. Whether or not a contract made under the Railway Labor Act is valid or not, is to be judged by the law of the state where it is made (cf. *Moore v. Illinois etc. RR. Co.*, 312 U.S. 630, 633-634; *Transcontinental Air v. Koppal*, 345 U.S. 653). Consequently, the legislature would have to enact a statute authorizing an officer or officers—no doubt the San Francisco Harbor Board—to negotiate a contract.

Under present concepts of state government:

“public office or employment never has been and cannot become a matter of bargaining and contract. . . . This is true because the whole matter of qualification, tenure, compensation, and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who represent the legislative body. . . . Thus, qualifications, tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract.” (*City of Springfield v. Clouse*, 356 Mo. 1239, 1251, 206 S.W. 2d 539, 545).

Thus, the people of California, as the repositories of state sovereignty and, acting through their legislature, would be forced under federal mandate to give up legislative

control over State Belt employees. The California Legislature would have to surrender its "continuing discretionary powers" (*City of Los Angeles v. Los Angeles etc. Council*, 94 Cal. App. 2d 36, 47, 210 P. 2d 305, 311) over terms of State employment vested in it by the people of the state (*Butler v. Pennsylvania*, 10 How. (51 U.S.) 402, 416). It is recognized that the act only requires the employer to "treat with" the bargaining representatives of employees. But to conform to the good faith bargaining requirements of the Railway Labor Act, the Legislature would have to surrender its legislative control over terms of employment for state employees and designate state officers to engage fully in collective bargaining with respect to all matters within the collective bargaining scope of the Railway Labor Act (*Brotherhood etc. v. Atlantic Coastline R. Co.*, 201 F. 2d (C.A.-4), 36, 39). "... government by contract instead of government by law" would then be instituted (*City of Los Angeles v. Los Angeles etc. Council*, 94 Cal. App. 2d at 46, 210 P. 2d at 311).

Furthermore, this concept that the terms of public office or employment and the compensation to be received can or should be stratified in a contract, runs counter to the decisions of this Court holding that the nature of the relation of public office or employment to the public "is inconsistent with either a property or a contract right" (*Taylor v. Beckham*, 178 U.S. 548, 577; *Butler v. Pennsylvania*, 10 How. (51 U.S.) 402, 416; Willoughby, *The Constitution of the United States*, Vol. 1, second ed. 1929, sec. 127, p. 227).

With respect to the enforcement features of the act, State Belt employees could carry California before the

National Railway Adjustment Board in Chicago, Illinois, as is sought to be done here, for the settlement of disputes over interpretations of the contract negotiated (cf. *Oklahoma v. U. S. Civ. Serv. Com.*, 153 F.2d (C.A.-10) 280, 282, *aff'd* 330 U.S. 127). These coercions and controls with respect to a state's employer-employee relationship (cf. *Johnson v. Maryland*, 254 U.S. 51, 57) would appear to be an interference with "The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies", a right "conceded by the uniform decisions of this court and by the practice of the Federal government from its organization." (*United States v. Railroad Co.*, 84 U. S. 322, 327; *In re Means*, 14 Cal.2d 254, 258, 93 P.2d 105, 107; *Attorney General v. Pelletier*, 134 N.E. (Mass.), 407, 415.)

Oklahoma v. U. S. Civil Service, 153 F.2d (C.A.-10) 280, 282, *aff'd* 330 U.S. 127, 143, referring to the application of the Hatch Political Activity Act to the states, declared:

"It is the prerogative of a state to create and maintain offices of government according to its own choice, *free from interference by the United States*. But this Act does not invade the rights of the states in the untrammelled exertion of that attribute of sovereignty.

... "

B. THE INCIDENTAL IMPORTANCE OF COLLECTIVE BARGAINING BY STATE EMPLOYEES ENGAGED IN INTERSTATE RAILROAD COMMERCE, CANNOT JUSTIFY FEDERAL INTERFERENCE WITH THE SOVEREIGN RIGHT OF A STATE TO CONTROL ITS EMPLOYEE-RELATIONSHIP.

The important constitutional question presented is whether Congress under the commerce power may control

a state's relations with its employees engaged in interstate commerce, as against a state's acknowledged right as a sovereign to provide, generally, by its own laws, the terms of employment. This presents to the Court the task of balancing and accommodating constitutional powers—the power of Congress to regulate labor relations in interstate commerce (*Virginian Ry. v. System Federation*, 300 U. S. 515, 545; *Railway Employees' Dept. v. Hanson*, 351 U. S. 225, 233) and the power of the sovereign states to control through state laws their relationship with their employees (*In re Duncan*, 139 U. S. 449, 461; *Taylor v. Beekham*, 178 U. S. 548, 571)—“a duty oftentimes of great delicacy and difficulty” (*South Carolina v. U. S.*, 199 U. S. 437, 448).

1. The federal government under its commerce power cannot control the state's employer-employee relationship, unless there are supervening reasons for justifying such control.

While this Court has said in *U. S. v. California*, 297 U. S. 175 that "California by, engaging in interstate commerce by rail, has subjected itself to the commerce power" (p. 185) and that the "sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution" (p. 184), nevertheless "like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument. . . ." (*Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 336).

Because a state function is part of interstate commerce, does Congress have absolute authority over everything related to that function, irrespective of the inherent rights of state governments? ("The 'Current of Commerce' "—Selected Essays on Const. Law, Vol. 3, pp. 184, 190-191).

The National War Labor Board was given jurisdiction over "labor disputes" which might interrupt work contributing to the effective prosecution of the war (Ex. Order 917, 50 U.S.C. App. 1507). Certainly, the power to wage war (Art. I, sec. 8, cl. 2) is as plenary as the commerce power. Yet, the Board held that it had no jurisdiction over a labor dispute between the transportation workers of the City of New York and that city's Board of Transportation and between the municipal employees of the City of Newark and the city government of Newark, the latter's transportation facilities being part

of interstate commerce. In an unanimous decision (*Municipal Government, City of Newark, etc.*, 5 War Labor Rept. 286 (1942)) by Dean Wayne Morse (now Senator Morse), the Board held that

"The National War Labor Board is unanimously of the opinion that as a matter of law, it does not have jurisdiction over labor disputes between state governments, . . . and their public employees. The well-established doctrines in American law pertaining to the sovereign rights of state and local governments clearly exclude such disputes from the jurisdiction and powers of the Board. . . ." (p. 296).

"It has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment those who are engaged in performing services for the states or their political subdivisions. . . ." (p. 288).

And, with particular reference to the adjudicatory authority of the Railroad Adjustment Board it should be noted that the National War Labor Board said:

"Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employees would constitute a clear invasion of the sovereign rights of the political subdivisions of the local-state government" (p. 288).

Some overriding necessity would have to exist to authorize federal control over a state's relationship with those of its employees engaged in interstate commerce, in the light of a state's countervailing right, and, in fact,

necessity, to fix the terms of employment by law, rather than contract (*Oklahoma v. U. S. Civil Service Com'n.*, 153 F.2d 280, *aff'd* 330 U. S. 127).

2. The fact that the State Belt has been characterized as a proprietary function of the State provides no different basis for applying the Railway Labor Act to California.

The right of a state to control its relationship with its employees by statute rather than by contract does not turn upon a distinction between proprietary and governmental functions (cf. *New York v. United States*, 326 U.S. 572). The operation of the State Belt has been described as proprietary from the standpoint of disallowing the State's claim of immunity from tort liability, (*People v. Superior Court*, 29 Cal.2d 754, 762, 178 P.2d 1). But the imposition of tort liability in connection with proprietary functions provides no valid distinction with respect to the constitutional feasibility of having state officers establish terms of employment by contract rather than statute. "We can find no legitimate reason for making any distinction in the present case between governmental and proprietary functions of the state" (*State v. Brotherhoods*, 37 Cal.2d 412, 421, 232 P.2d 857, 863. The distinction was rejected in *Nutter v. City of Santa Monica*, 74 Cal. App.2d 292, 302, 168 P.2d 741, 748 (involving city bus lines) and in *City of Los Angeles v. Los Angeles, etc. Council*, 94 Cal.App.2d 26, 45-46, 210 P.2d 305, 311 (Dept. of Water & Power).

In prescribing terms of employment, the state is acting in its governmental capacity regardless of the particular way in which the employee serves the state. The distinc-

tion has been found unworkable in public employment—
 “A single civil service system governs all classified positions in the City’s service, regardless of whether they involve an exercise of governmental or proprietary functions (*City of Los Angeles v. Los Angeles etc. Council*, 94 Cal.App.2d 26, 46, 210 P.2d 305, 311; *Teller, Labor Disputes and Collective Bargaining*, 1947 Supp., sec. 171, p. 117).

As already noted, any money awards rendered by the Adjustment Board in the disputes involved in this case, could not be enforced by the individual respondents through suits in the federal district courts as contemplated by the Railway Labor Act (sec. 3 First (p)) because of the prohibition of the Eleventh Amendment. That constitutional restriction remains, even though California in its operation of the State Belt is regarded as engaged in a proprietary function (*Murray v. Wilson Distilling Co.*, 213 U.S. 151).

C. THE COURT SHOULD ADOPT AN INTERPRETATION OF THE RAILWAY LABOR ACT WHICH WILL AVOID RAISING SERIOUS CONSTITUTIONAL QUESTIONS.

To hold the Railway Labor Act applicable to a state raises two serious questions of constitutional power: (1) The power of Congress to require a state to establish by contract the terms of employment for state employees engaged in interstate commerce, despite a state’s inherent right to maintain a continuing legislative control over such employment; (2) The use of the federal judicial power at the behest of private parties in the act’s enforcement and adjudicating procedures, in face of the prohibition of the Eleventh Amendment.

This Court has "repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid," its "plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same", (*N.L.R.B. v. Jones and Laughlin*, 301 U. S. 1, 30).

It is difficult to predict what this Court would say on the constitutional issues if it first held that Congress intended to impose the Railway Labor Act on state employment. But at least there is serious doubt about the matter, and "to avoid a serious doubt", it would seem that the court should hold that Congress in the Railway Labor Act did not intend to undertake the unprecedented step of regulating the employer-employee relationships of the states.

IV.

THE AUTHORITIES RELIED UPON BY THE SEVENTH AND FIFTH CIRCUITS ARE EASILY DISTINGUISHABLE.

Petitioner here, as did the California Supreme Court in *State v. Brotherhoods*, supra, has considered the subject matter, statutes in *pari materia*, the act's history, the mischiefs to be corrected, the inapplicability of the enforcement scheme, and the avoidance of constitutional questions to present the act to the Court in its total environment. On the other hand, as pointed out (supra), the court below failed entirely to use these accepted interpretative aids for the construction of the general language of the act. In fact, it made a virtue of necessity by relying on the general language to solve the problem of construing the general language.

The court below (R. 91) as did the Fifth Circuit in *New Orleans Public Belt R. Com. v. Ward* (195 F.2d (C.A. 5) 829, 831) bases its decision upon the broad definition of the term "carrier" in the act. However, the act merely defines "carrier" as a "carrier by railroad, subject to the Interstate Commerce Act". It is to be noted that the Fifth Circuit gave only cursory consideration to the question of congressional intent to apply the act to a public carrier and then only when notice was received that this Court had denied certiorari. The parties did not consider the issue in the district court.

The Seventh and Fifth Circuits failed to follow the example so frequently set by this Court in dealing with general statutes which would limit the exercise of the reserve powers of the states (*United States v. United Mine*

Workers, 330 U.S. 258, 270-276; *United States v. Wittek*, 337 U. S. 346, 358-359).

City of New Orleans v. Texas & Pac. Ry. Co. (195 F.2d (C.A. 5) 887), merely indicates that publicly owned carriers engaged in interstate commerce are subject to the jurisdiction of the Interstate Commerce Commission (see *United States v. California*, 297 U. S. 175).

We have already shown that there are affirmative reasons for holding the federal Safety Appliance Act, 45 U.S.C., ch. 1, and the federal Employers Liability Act, 45 U.S.C., ch. 2, applicable to a state carrier. *California v. Anglim* (129 F.2d (C.A. 9) 455; (R. 91)) differs in two respects. It involved a tax on a non-essential state function (*New York v. United States*, 326 U.S. 572; see *Helvering v. Powers*, 293 U. S. 214; *South Carolina v. United States*, 199 U. S. 437). Actually the court had only the tax question before it. Secondly, if the purpose of the tax can be considered in determining the validity of its imposition upon a state, which is doubtful, *Anglim* refers to the congressional intent to attract men to the national railroading organization and to encourage them to remain by providing pensions based upon service to "an all embracing entity", i.e., *national railroading* as distinguished from individual employer carriers (129 F.2d at 459). It may be argued that the creation of a retirement plan under which the State Belt employees will receive pensions is an interference with or control over part of California's employer-employee relationship which has received the approval of a circuit court. In the first place, the retirement plan is "wholly divorced" from the tax imposed upon the State.

"The railroads and their employees pay wage-taxes—but these tax payments are wholly divorced from the pension fund. . . . the amount of the railroad employees' withholding payments—the wage-taxes—has no relation to the pension amounts the United States Government will pay to the railroad employees or their dependents" (*Estate of Tarrant*, 38 Cal.2d 42, 50, 237 P.2d 505, 509; citing *State of California v. Anglim*, supra).

The Railroad Retirement Act (49 Stat. 967, as amended, 45 U.S.C. 228a) does not require the men to retire. The state, if it wished, could have its own retirement plan. While superficially there may be a semblance of the type of control contemplated here, actually no duties or controls are imposed as in the case of the Railway Labor Act.

Petitioner does not believe that the requirement of uniform safety appliances on a railroad car is of the same character and nature as the alleged requirement that the state operator of the car must establish working conditions for its employees by contract rather than by statute. Nor is the imposition of a rule of liability for injuries suffered through a failure to maintain a safety appliance, the same thing as federal policing of the sovereign state's relationship with its employees. A payroll tax, based upon the wages a carrier pays to its employees, does not differ greatly from income taxes imposed upon a state operated liquor business (*South Carolina v. United States*, 199 U.S. 437) or a state operated transit system. (See *Helvering v. Powers*, 293 U.S. 214.)

Each new assertion of the federal commerce power which further reduces the sovereign authority of the states,

deserves careful consideration of the particular control being imposed. As one judge of this Court has said, "In this manner, case by case adjudication gives to the judicial process, the impact of actuality and saves it from the hazards of generalization."

In the Railway Labor Act, Congress would be depriving the states of their inherent right as constituent parts of the federal plan to maintain a continuing legislative control over the terms upon which its officers and employees carry out state functions, and would require the employer—the people of the state—to stratify those terms in a contract. "An unexpressed purpose" to so "nullify a state's control over its officers and agents is not lightly to be attributed to Congress." (*Parker v. Brown*, 317 U.S. 341, 351).

V.

THE ADJUSTMENT BOARD LACKS JURISDICTION OVER RESPONDENTS' CLAIMS AS THE HARBOR BOARD HAD NO AUTHORITY TO MAKE THE CONTRACT UPON WHICH THE CLAIMS ARE BASED.

Should the Court hold the act applicable to a state owned carrier, the question remains: Is there a valid contract to be interpreted and applied by the Adjustment Board? If not, the Board is without jurisdiction.

The Adjustment Board exists for the adjustment of disputes "growing out of the interpretation of existing agreements". "The Board has no other functions, . . ." (The National Railroad Adjustment Board: A Unique Ad-

ministration Agency, 46 Yale L.R.. 567; *Slocum v. Delaware etc. RR. Co.*, 339 U.S. 239, 242-243). Respondents' claims are based upon the contract of September 1, 1942 (R. 6-9, 100-116). Petitioner asserts here (R. 27) and has asserted in its submissions to the Adjustment Board that the Board lacks jurisdiction to hear and decide the claims because the collective agreement is invalid, in that the Harbor Board lacked authority to execute it (Brewster—Docket 25.034, Mang. Sub. p. 11, R. 99). However, "The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board. . . . This dispute involves the validity of the contract, not its meaning. . . ." (*Brotherhood of RR. Trainmen v. Howard*, 343 U.S. 768, 774). Before the Board can be ordered to hear and decide respondents' claims, the Court must find that there is a valid contract. And whether or not a collective agreement is valid or invalid is to be judged by the law of the state where the contract was made. As this Court said in *Colgate etc. Co. v. National Labor Relations Board*, 338 U.S. 355 "We therefore also look to the law of the state where the closed-shop contract was made, here, California, to determine its validity" (p. 361). The same rule applies with respect to contracts negotiated pursuant to the Railway Labor Act (*Moore v. Illinois etc. RR. Co.*, 312 U.S. 630, 633-634; *Transcontinental Air v. Koppal*, 345 U.S. 653, 656-657). Consequently, the rules by which a state is bound by a contract negotiated by state officers will apply here.

The authority of the Harbor Board with respect to the employment and terms of employment of the State Belt

employees was limited to appointing them "subject to civil service laws" (Calif. H. & N. Code secs. 1732, 1732.7; app. 81). Otherwise, the State Civil Service Act (Calif. Gov. Code secs. 18000-19765) and the rules and regulations of the State Personnel Board provide a comprehensive system under which the State Personnel Board supervises all phases of rates of pay, status of employees and working conditions for all State employees within the State Civil Service System (*State Comp. Ins. Fund v. Riley*, 9 Cal. 2d 126, 134, 69 P. 2d 985, 988-989). The authority granted the Harbor Board over persons employed at the Harbor and on the State Belt prescribes the limit of its powers. Where a power is conferred by statute and the mode of its exercise is also prescribed, the mode is the measure of power (*Cowell v. Martin*, 43 Cal. 605, 614).

The authorities make it abundantly clear that, under California law, particularly where there is a civil service system, the Harbor Commission lacked authority to make the collective agreement (*Nutter v. City of Santa Monica* (74 Cal. App. 2d 292, 298, 168 P. 2d 741, 745); *City of Los Angeles v. L. A. etc. Council* (94 Cal. App. 2d 36, 44-47, 210 P. 2d 305, 310-312); *Mugford v. Maryland City Council* (44 Atl. 2d (Md.) 745). *State v. Brotherhood of RR. Trainmen* (37 Cal. 2d 412, 232 P. 2d 857) clearly indicates that the Harbor Board did not have the authority to negotiate the present contract in derogation of the State's civil service laws (37 Cal. 2d 412, 417-419, 232 P. 2d 857). The agreement creates conflicts in a number of particulars, some allegedly being the basis of the disputes in the submissions before the Board (i.e., Brewster Docket, *supra*; appendix 84-85).

"The statutory provisions controlling the terms and conditions of civil service employment cannot be circumvented by purported contracts in conflict therewith" (*Boren v. State Personnel Bd.*, 37 Cal.2d 634, 641, 234 P.2d 981, 985). The Brotherhoods as the collective bargaining agents of respondents must be presumed to have known that "... state employment is accepted subject to statutory provisions regulating such matters as salary, working conditions and tenure" (*Boren v. State Personnel Bd.*, supra, at 639, citing *State v. Brotherhood of Railroad Trainmen*, supra).

The circuit court elected to hold that the State Department of Finance had impliedly approved the contract either at the time of its execution or by auditing the payroll for employees covered by the contract under its supervisory authority (R. 95). Assuming this to be the fact (actually it was contested infra, 71), rates of pay for civil service employees and terms of employment are fixed by the State Personnel Board (Gov. Code secs. 18703, 18705, 18850, and 18853). The acts of the Department could not give validity to rates of pay and terms of employment in conflict with State civil service. Hence, even if the Act applies to California, the contract before the Court still must be judged by the usual concepts of contract law. The Harbor Board, as the agent of the State charged with the general administration of the State Belt (Calif. H. & N. Code sec. 1732.7, app. 81-82) simply lacked the authority to bind its principal, the State of California.

However, it may well be that California through its legislature would be required to enact legislation authorizing some State agency, such as the State Personnel Board or the Harbor Board, to collectively bargain with representatives of its State Belt employees and thus enable the State agency to properly and authoritatively enter into a collective bargaining contract.¹¹ But, until that is done, no contract exists upon which the jurisdiction of the Adjustment Board can be based. Therefore, the lower court was in error in ordering the Adjustment Board to proceed to hear and determine claims based upon a contract which was invalid.

A. THE STATE CANNOT BE ESTOPPED BY THE ALLEGED ACTION OF ITS OFFICERS PURPORTING TO ACT UNDER THE CONTRACT.

The opinion of the circuit court suggests that California is now estopped to claim that the contract is void because respondents "rendered service to the Harbor Board and received their pay under the agreement" (R. 93, 96). Allied to this is a statement that "it would be an inequity for a court at this time to declare" the contract void to the detriment of the seniority rights "based upon service rendered by them under said contract" (R. 96). It is definitely established by the California decisions, and by the federal authorities as well that "... the

¹¹This authorization would be granted on the ground that the Railway Labor Act under the supremacy clause (U. S. Const. Art. VI, cl. 2; Calif. Const. Art. I, sec. 3) automatically superseded the provisions of the California Constitution (Art. XXIV) establishing State Civil Service, and a constitutional amendment would not be required.

authority of a public officer cannot be expanded by estoppel" (*Boren v. State Personnel Board*, 37 Cal.2d 634, 643, 234 P.2d 981, 986; *Utah Power etc. Co. v. U. S.*, 243 U.S. 389, 409). Even receipt of performance under a contract will not establish estoppel (*Pine River Logging Co. v. U. S.*, 186 U.S. 279, 291).

Furthermore, if life is to be breathed into the contract through the doctrine of estoppel to provide a judicial basis for adjudicatory action by the Adjustment Board, it should be noted that the contemplated order of the circuit court is only grounded upon the record made in connection with the motions for summary judgment (R. 73). There are no admitted facts in the pleadings to support the circuit court's statement that respondents received their pay and rendered services pursuant to the contract—which is the basis for the suggested estoppel. On the contrary, the contract (R. 100) sets forth rates of pay effective September 1, 1942. There is no indication that these rates have ever been changed since that date by collective bargaining (R. 116). We believe that the Court can surmise that, since that date, there have been many changes in rates of pay established under civil service procedures by the California State Personnel Board. Hourly rates of pay are fixed by the State Personnel Board (Calif. Gov. Code sec. 18500) after taking into account the prevailing rates of wages in the particular locality (San Francisco) (Calif. Gov. Code sec. 18853). Obviously, the compensation so fixed by the State Personnel Board is based upon the premise that the service is to be rendered pursuant to con-

ditions of work as established by the civil service statutes and regulations (*Boren v. State Personnel Board*, 37 Cal. 2d 634, 639, 234 P.2d 981, 982). Similarly, seniority rights obtained through the performance of such service under these conditions would be determined by such statutes and regulations.

1. **Whether or not respondents' services were rendered pursuant to the collective contract is a contested issue of fact.**

Whether or not respondents' services were rendered under a contract or pursuant to State civil service laws was a contested issue of fact. Respondents alleged in their complaint that the services were rendered pursuant to the contract (R. 6-9). The carrier members denied the allegation for lack of information and belief (R. 18, 19), which constituted a denial (F.R.C.P. 8(b)). California, in its answer, alleged that respondents' employment rights were all measured by the civil service laws of the State and no rights with respect to any of the matters referred to in the complaint were acquired by plaintiffs under the collective bargaining agreement (R. 27). Therefore, should the Court reach the question of whether the contract can be treated as valid on the basis of estoppel, the case should be remanded for a trial on the issue (*Fountain v. Filson*, 336 U.S. 681; *Standard-Vacuum Oil Co. v. U. S.*, 339 U.S. 157, 160-161).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1956

No. 385

STATE OF CALIFORNIA,

Petitioner,

vs.

HARRY TAYLOR, PETER A. CALUS, JAMES W.
BREWSTER, et al.,

Respondents.

REPLY BRIEF FOR PETITIONER.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 385

STATE OF CALIFORNIA,

Petitioner,

vs.

HARRY TAYLOR, PETER A. CALUS, JAMES W.
BREWSTER, et al.,

Respondents.

REPLY BRIEF FOR PETITIONER.

PRELIMINARY STATEMENT:

This reply brief also will answer the brief for the United States as amicus curiae filed by the Solicitor General at the invitation of the Court (R. 98): Because the Government's brief presents a new antagonist, armed with new arguments, the reply is of greater length than would otherwise be necessary.

The Solicitor General states that the collective agreement, upon which the instant disputes before the National

Railroad Adjustment Board are based, "was observed by the parties until on or about November 13, 1951" (U.S. Br. 4). Should the validity of the contract or its continuity become pertinent, it should be noted that whether or not the contract was "observed" by the parties and whether respondents rendered service thereunder, were contested issues of fact under the pleadings herein (Pet. Br. 69-71), although the Court below makes the same statement of fact (R. 93, 96).

While the present record does not fully disclose all of the "facts of life" under the contract, it is apparent that from the time the Harbor Board, which succeeded the Board which made the agreement, was appointed, there was controversy over the basic validity of the contract (R. 55). The record shows disagreement over the application of civil service laws vis-à-vis the agreement at least as early as April, 1946 (Taylor Docket 24,211 Pet. Br. 7, R. 99). The date selected for the end of the so-called observance of the agreement, November 13, 1951, is the date on which this Court denied certiorari in *State of California v. Brotherhood etc.*, 37 Cal.2d 412, 232 P. 2d 857, cert. den. 342 U.S. 876, in which California secured a declaratory judgment holding the contract invalid (Pet. for Cert. 22). Obviously, that litigation was initiated by the successor Board years prior to 1951 (R. 55).¹

¹The situation with respect to the instant contract is somewhat like that which faced the City of New York when, in June, 1940, its Board of Transportation acquired ownership of the B.M.T. and I.R.T. subway system and "inherited" collective bargaining agreements with a union, representing the subway employees. Prior to acquisition, the State of New York provided civil service status for these employees (N.Y. Law of 1939, c. 927). A declaratory judgment action was brought to determine the validity of the agree-

ARGUMENT.

I.

AFFIRMATIVE REASONS MUST EXIST INDICATING THAT CONGRESS INTENDED THE GENERAL LANGUAGE OF THE RAILWAY LABOR ACT TO APPLY TO A STATE.

Respondents are correct—petitioners' position is stated in *State v. Brotherhood of Railroad Trainmen*, 37 Cal.2d 412, 416, 232 P.2d 857, 860, which sets forth the well-settled rule "that statutes which in general terms divest preexisting [sic] rights or privileges will not be applied to a sovereign, in the absence of express words to that effect, unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected." The opinion relies upon *U. S. v. United Mine Workers*, 330 U.S. 258, 272-273, and *U. S. v. Wittek*, 337 U.S. 346, 358-359. The rule that a restrictive statute will not be deemed to apply to the sovereign unless expressly named therein, at first, was regarded as an exclusionary one (*Guarantee Co. v. Title Guaranty Co.*, 224 U.S. 152, 155-156). It is now a rule of construction, which will be employed unless there are implied or affirmative reasons for believing that the sovereign was also to be included within the restrictive statute.

In a system of dual sovereignty the rule also applies to federal restrictive statutes when it is asserted that the

ments but was never brought to trial, although it was off calendar for a number of years. The story is told in Rhyne, *Labor Unions and Municipal Employee Law*, 1946, pp. 116-120, cited by the United States (Br. 12). Speculating upon the judicial attitude, if the case were brought to trial at a later date, the author states: "it may be questioned whether the courts would determine legal questions concerning contracts which have expired or which have been continued solely to obtain judicial construction." (p. 117.) (Emphasis added.)

general language applies to a state (Sutherland, Statutory Construction (3d ed.) Vol. 3, § 6301, p. 185; see *Parker v. Brown*, 317 U.S. 341, 351; cf. *U. S. v. Wittek*, 337 U.S. 346, 358-359). In *U. S. v. California*, 297 U.S. 175, the state contended that the Safety Appliance Act (45 U.S.C. sec. 1 et seq.) did not apply to the State Belt Railroad because the states were not explicitly named in the act (p. 179). The Court, treating the rule as an exclusionary one, refused to extend it so as to exempt a state from otherwise applicable provisions "all embracing in scope and national in purpose" (Pet. Br. 26-27). Today, the case is regarded as holding that general restrictive statutes will not be applied against a state or the federal government unless there are extraneous and affirmative reasons for believing that Congress intended to impose them upon government (*U. S. v. United Mine Workers*, 330 U.S. 258, 272-273).

A. TO AVOID CONSIDERING THE EVIDENCE BEARING UPON THE INTENTION OF CONGRESS, RESPONDENTS AND THE UNITED STATES CONTEND THAT THE ACT EXPRESSLY INCLUDES THE STATES.

1. **Incorporation of the general scope of the Interstate Commerce Act does not constitute an express declaration by Congress that a state carrier is subject to the Railway Labor Act.**

Respondents and the Solicitor General attempt to avoid the rule that a state will not be deemed included within a restrictive statute unless expressly named therein, by arguing that the State Belt has indeed been expressly included in the Railway Labor Act because of the fact that the act covers all carriers, subject to the Interstate Commerce Act (Resp. Br. 12). The term "carrier" is defined as "any . . . carrier by railroad, subject to the Interstate

Commerce Act" (45 U.S.C. sec. 131; First). The argument then runs—Congress, in the Railway Labor Act, adopted the definition of "carrier" as used in the Interstate Commerce Act, i.e., "common carriers engaged in . . . [t]he transportation of passengers or property wholly by railroad. . . ." (49 U.S.C. sec. 1) and that latter act, in practice, has been regarded as applying to the State Belt. Hence, the Railway Labor Act by "its express terms" applies to the State of California (U.S. Br. 6-7; Resp. Br. 13). Though contrived, the contention has apparent plausibility.

In the first place, the two acts were inter-related for the obvious purpose of providing a consistent approach to what constitutes railroad commerce. It was a compendious way for Congress to declare what type of carriage by rail would be considered as being interstate commerce. Actually, reference to the Interstate Commerce Act, doesn't do any more than to say that common carriers by railroad, if engaged in interstate commerce, are subject to the regulatory provisions of the Railway Labor Act. Both acts are in general terms, so the inquirer who wishes to know if Congress intended to include the states, is left approximately where he started. Quite different it would be, if the Interstate Commerce Act further defined carriers as including carriers operated by a state. But the Solicitor General composes an express declaration of Congress from the fact that the general words of the Interstate Commerce Act have been *interpreted* as applying to the State Belt (U.S. Br. 7). At most, the contention is that if Congress intended the rates of a state operated carrier to be regulated, it would also intend that a state be required

to fix wages and working conditions for its employees by collective bargaining and that any state collective agreement should be policed by federal boards and courts. Such an interpretation of general language built upon an interpretation of other general language, is not a sure foundation for such a fundamental conclusion, unless it can be verified by relevant evidence bearing upon the intention of Congress.²

B. REFERENCE IN THE RAILWAY LABOR ACT TO WHAT CONSTITUTES INTERSTATE RAILROADING, DOES NOT SATISFY THE REQUIREMENT THAT THE STATES BE EXPRESSLY NAMED IN RESTRICTIVE STATUTES.

Respondents point out that the Railway Labor Act refers to "common carriers by railroad, engaged in interstate commerce" as distinguished from the person, corporation, or other entity, operating the carrier. Hence, say respondents, the test is a functional one only (Resp. Br. 14-15), which, they imply, precludes any need for considering other factors bearing upon congressional intent. If the functional test is valid at all, the real frame of reference is to the carrier as an employer of interstate railroad labor. The act is replete with references to "a carrier or car-

²The Alaska Railroad is owned and operated by the federal government under the jurisdiction of the Interior Department. Tariffs have been set by the Interstate Commerce Commission (*U.S. v. Berger*, 66 F.Supp. 950, 952) and "working agreements" covering various classes of employees have been made (Rhyne, *Labor Unions and Municipal Employee Law*; 1946, p. 143). If disputes or claims were filed with the Adjustment Board in Chicago, we speculate as to what the position of the Solicitor General would be on the amenability of the United States to the jurisdiction of the Board and enforcement of the Board's awards against it, in the federal courts. By the argument made here, the federal carrier would come within the definition of carrier in the Interstate Commerce Act and, therefore, subject to the Railway Labor Act and the Adjustment Board's jurisdiction.

riers and its or their employees" (45 U.S.C. sec. 152, Second, Third, Fourth, Sixth, Eighth, Ninth; sec. 153, First (h), (i), Second). But where a statute generally describes the function being performed, the problem still remains of determining whether or not Congress intended to include government as one of the performers of the function. In *U. S. v. United Mine Workers*, 330 U.S. 258, the term "employer" in the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. sec. 101 et seq.) and in *U.S. v. Wittek*, 337 U.S. 346, the term "landlord" in the District of Columbia Emergency Rent Act (55 Stat. 788), were also functional terms and yet the Court, in each case, proceeded to consider all factors concerning the legislation in order to determine if Congress intended the statute to apply to government. As pointed out by petitioner (Br. 26), the Safety Appliance Act (45 U.S.C. sec. 1 et seq.), also uses the term "every common carrier by railroad" without regard to the identity of the owner or operator. Yet, in *U.S. v. California*, 297 U.S. 175, the Court was not content to rely either upon the broad language covering generally all interstate railroad carriers or upon a functional test. The act's purpose; the dangers apprehended, and the necessity for application to state, as well as to privately owned carriers, were the touchstones of decision.

1. **All authorities interpret statutes requiring employers to engage in collective bargaining as not being applicable to government.**

Essentially, the Railway Labor Act requires common carriers by railroad, engaged in interstate commerce, to engage in collective bargaining with the representatives of their employees and provides for settlement of dis-

putes. Even where, as here, public agencies fall completely within general definitions, the courts have unanimously construed statutes requiring employers to collectively bargain, as not applying to public employment. (Cases cited Pet. Br. 29-32; Rhyne, Labor Unions and Municipal Employee Law, Supp. Report 1949, pp. 15-18; 31 A.L.R. 2d 1142, 1149.)

For the first time it is being asserted that Congress would or could regulate and police a state's employer-employee relationship. Certainly, the Court will not be content to announce that Congress so intended, upon a wording so ingeniously employed by respondents and the United States. California has approached the problem in the light of what this Court said in *U. S. v. American Trucking Associations*, 310 U.S. 534 at page 542:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation. There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the

act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' (542-544.)

Petitioner has considered all the criteria usually indicative of legislative intent. The subject matter (Pet. Br. 29), other federal statutes pertaining to the employer-employee relationship (p. 32), the purposes and evils to be corrected (p. 36), history of the act (p. 38), the existence of a need for uniformity or any other compulsive implications that a state must be under the act (p. 38), the unavailability of enforcement and adjudicating procedures of the act against a state (p. 41), and the constitutional doubts concerning congressional power to control a state's employer-employee relationship either under the commerce or judicial power (p. 51). All these judgment factors converge to show that Congress never intended to impose collective bargaining upon a state. Respondents, instead of answering this overwhelming evidence, simply refer the Court to the opinion of the California District Court of Appeal in *State v. Brotherhoods* (Cal. App.), 220 P. 2d 27, and the dissent of one lone justice, when that case was decided by the California Supreme Court (37 Cal. 2d 412, 422, 232 P. 2d 857, 864, pp. 35-45 Appendix to Pet. for Cert.). The California District Court merely relies upon *United States v. California*, 297

U.S. 175, saying that it is decisive of the main question. There is no consideration by that court of the construction aids suggested by petitioner here.

Essentially, the argument of Justice Carter is that, because other railway acts having employment connotations, have been found applicable to a state operated railroad, namely, the Safety Appliance Act (45 U.S.C. sec. 1; *U.S. v. California*, 297 U.S. 175); the Federal Employers' Liability Act (45 U.S.C. sec. 51; *Maurice v. California*, 43 Cal. App. 2d 270, 110 P. 2d 706), and the Carriers' Taxing Act (26 U.S.C. sec. 3231), *California v. Anglim*, 129 F. 2d (C.A.-9) 455, *a fortiori* the Railway Labor Act is also applicable. This argument is also made by the United States (Br. for U.S. 6-8). The answer appears in Petitioner's Brief (pp. 26-27, 38-40, 63-65).

II.

NO OBJECTIVES OF THE RAILWAY LABOR ACT INDICATE THAT CONGRESS INTENDED THE ACT TO APPLY TO A STATE.

The basic objectives are clearly set forth by the act itself: to avoid interruption of commerce in the form of strikes, by providing for collective bargaining with representatives of employees freely chosen, and for the settlement of disputes through federal adjustment or mediation boards or arbitration (45 U.S.C.—General Purpose, sec. 151a).

Petitioner has shown that the evils to be met, i.e., the strike and the company union, are not referable to public employment (Pet. Br. 26-28). The method—collective

bargaining—is universally held not to be available to public employment (Pet. Br. 29-32). Enforcement procedures for the settlement of disputes are either inappropriate to the relationship between a state and its employees (*State v. Brotherhood*, 37 Cal. 2d 412, 420, 232 P. 2d 857, 863), or are unavailable because of the Eleventh Amendment (Pet. Br. 41-51).

Not being able to find that a state's employer-employee relationship must be controlled in order to fulfill the stated purposes of the act, the Solicitor General argues that Congress might well have intended that every carrier should engage in collective bargaining as that would tend to create uniform rules and working conditions in the national railroad system, and to produce a desirable mobility within the railroad labor force (U.S. Br. 10). While the Solicitor General speculates on what Congress "might well have deemed" the objective of collective bargaining to be, the real inquiry is whether the Court from the general plan of the act can say that necessarily every carrier, including a state carrier, must establish rules and working conditions by collective bargaining with a representative of the crafts of its employees. At the outset, the design of the act does not support the Solicitor General's suggestion, that collective bargaining itself as a method of establishing working conditions in the railroad industry, was one of the purposes of the act. The objective was settlement of disputes through collective bargaining as a means of insuring peace in the national railroad system. The suggestion that Congress required collective bargaining as a means of fostering the adoption of working rules consonant with the special circumstances and traditions

of the railroad industry (U.S. Br. 10) is put aside by this Court in *Terminal R.R. Assn. v. Brotherhood of R.R. Trainmen*, 318 U.S. 1:

“ . . . The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix *generally applicable standards for working conditions*. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. . . .” (p. 6.) (Emphasis added.)

The idea is posed that Congress sought to encourage negotiation with union officers who are intimately acquainted with railway problems and traditions. The Railway Labor Act does not compel employees to designate representatives for collective bargaining purposes nor does it compel agreement (*Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 548). Quite possibly, civil service employees of a public carrier might not wish to organize for establishing their working conditions by bargaining under the Railway Labor Act, being content with civil service techniques for fixing wages and conditions (Pet. Br. 8).

Another thought is that Congress might have contemplated collective bargaining by carriers “of an integrated national system” and railway brotherhoods “national in scope” which would “minimize conflict and disharmony” with respect to wages and working conditions. The provisions of the act contain no such implication. Each

railway carrier and each representative of a craft or class on each railroad property is left to work out its individual agreement. "... the act makes no provision for industry-wide collective bargaining." (Natl. Med. Bd., 21st Ann. Rep., 1955, p. 14). "There are approximately 1,200,000 employees of the 710 common carriers by rail. . . . These employees are covered by many thousands of labor agreements." (Report, *supra*, p. 2). Some 5,190 railroad labor agreements, negotiated under the act, were on file with the National Mediation Board in the fiscal year 1956. The majority are with national unions. A substantial number are held by system associations. Some by local unions. However, the same craft may be represented by different unions on different properties (Natl. Med. Bd., 22nd Ann. Rep., 1956, Table 8, p. 58). As the National Mediation Board states:

"The collective bargaining unit under the Railway Labor Act is the '*craft or class*' of employees on the *individual* carrier, regardless of whether the carrier is a terminal or a switching company whose operations are confined to a single city, or whether the carrier's lines extend through many States. . . ."

"Generally, the representation and collective bargaining rights for these separate crafts or classes of employees are held by separate and independent unions, and separate contracts are negotiated for each craft or class." (Natl. Med. Bd., 21st Ann. Rep., p. 2). (Emphasis added.)

Recognition of an exclusive bargaining agent, chosen by a majority of each craft or class on a carrier—a basic part of the act (45 U.S.C. sec. 152, Fourth)—is universally recognized as incompatible with legal rules governing pub-

lic service (Rhyne, Labor Unions and Municipal Employee Law, 1946, pp. 151-152). The union shop provisions (45 U.S.C. sec. 152, Eleventh) are also deemed to be unworkable (*City of L. A. v. Los Angeles etc., Council*, 94 Cal. App. 2d 36, 210 P. 2d 305).

It is contended that another congressional objective in requiring every carrier to collectively bargain was to "permit a desirable mobility within the railroad labor force" (U.S. Br. 10). No provision in the act facilitates the movement of railroad labor within the industry. Employment rights, such as seniority and accumulated sick leave, are not transferable from one carrier to another, upon change of employment. Such an interchange of rights, to be achieved by collective bargaining, was not contemplated and has not been secured through collective bargaining in the railroad field.

As a state owned carrier doesn't fit the frame of the act in all the other aspects, either factually or legally, we submit that a state carrier should not be read into the act upon the tenuous theory that Congress might have required railroad employers to engage in collective bargaining, as a means of bringing about greater uniformity of working conditions.

Respondents refer to the many railroads in the country owned and operated by states or their political subdivisions (Resp. Br. 15). Later, they list some 30 railroads as being owned by states or their municipalities (Resp. Br. 49). Actually, but 11 of these roads are *operated* by states or public entities. Operation is the determining factor when assessing the impact of the number of roads which might not be subject to the Railway Labor Act. The

total trackage operated—362 miles—is an infinitesimal amount compared to the total trackage of privately operated railroads (I.C.C. 69th Ann. Rep.). The rest are either operated by private corporations, in which a public body has some stock interest, or they are under long term lease. For example, the Cincinnati Southern Railway, owned by the City of Cincinnati, is under lease to the Southern Railway for 99 years from January 1, 1928 (I.C.C. 69th Ann. Rep., p. 556, No. 461). There were scarcely enough of such publicly operated railroads to engage the attention of Congress, as the respondents suggest (Resp. Br. 49-50).

At this point we might observe that considering the small number of publicly operated carriers which are either switching or terminal roads, Congress would have little concern with imposing the collective bargaining method on them as a means of fostering uniform rules or national wage and rule agreements. The advantage, if any, to be gained by imposing the foreign system of establishing working conditions by collective bargaining upon a state would appear small, as against the unprecedented assertion by Congress of control of a state's employer-employee relationship. The retention by a state of its traditional method of fixing terms of employment, by statute and regulation (in this case by civil service), would have no adverse effect upon the general effectiveness of having private carriers engage in collective bargaining.

The Solicitor General argues that Congress might well have deemed this system of collective bargaining "more advantageous, both for the owning state and for its railroad employees, than application to these employees of

a civil service system necessarily framed in relation to ~~totally~~ different types of work and employment (U.S. Br. 10). On the other hand, assuming Congress put its mind to the matter, strikes which collective bargaining was designed to prevent are practically, if not entirely, non-existent in state operations. Craft or class characteristics whether they concern railroad or harbor employees, bus drivers, carpenters, etc., are continually being considered by state and municipal personnel boards or commissions when classifying positions or fixing wages on the basis of existing rates, *e.g.*, California Government Code sections 18858 and 18853. Furthermore, this is often done by conferences with representatives of the crafts and rules and wages set without the counter pull of stockholders seeking their share of the profit dollar.

If Congress were so intent upon achieving industry-wide uniformity of wages and working conditions through the universal use of collective bargaining in railroad commerce, it would seem logical that the minimum base for such bargaining—the Fair Labor Standards Act (29 U.S.C. secs. 201-219) which applies to privately owned carriers (*Rockton etc. R. Co. v. Walling*, 146 F. 2d (C.C.A.-4) 111), would also have been made applicable to publicly operated carriers. It was not (*Creekmore v. Public Belt R. Com.*, 134 F. 2d (C.C.A.-5) 576, 577, 578; Pet. Br. 34).

A. IT IS NOT ESTABLISHED THAT CALIFORNIA HAS OPERATED SUCCESSFULLY OR OTHERWISE UNDER THE 1942 CONTRACT, OR THAT PUBLIC EMPLOYMENT IN THE RAILROAD FIELD CAN BE CARRIED OUT BY COLLECTIVE BARGAINING.

In answer to petitioner's contention (Pet. Br. 30-38) that the establishment of wages and working conditions

by collective bargaining are repugnant to concepts of public employment, the Solicitor General contends that the very facts here, show that it can and has been done.

"The Belt Railroad was operated for more than 9 years—from September 1, 1942 to November 13, 1951—upon the basis that it was subject to the Railway Labor Act, and no showing has been made that such operation gave rise to legal or practical difficulties." (U.S. Br. 11.)

The contrary is the fact (*supra* pp. 1, 2). The legal difficulties are reflected in the litigation in the trial and Appellate Courts of California (*State v. Brotherhood, etc.*, 37 Cal.2d 412, 232 P.2d 857). The practical difficulties which the succeeding Harbor Board experienced between the conflicting demands of state civil service and those of the contract, appear, in part, in the present dockets before the Board. Even treating the contract as valid, the employees were partly under civil service and partly under the contract. When conflict developed, the Harbor Board adhered to civil service. As a result, the disputes pending in the present dockets arose (Pet. Br. 7).

As a general matter, California naturally seeks to maintain the integrity of its civil service system, which, but for a small number of exempt officials and confidential secretaries, applies to every employer in the state. Petitioner believes, too, that, from the standpoint of its State Belt employees themselves, the civil service system has superior advantages to the wage and working conditions which have been produced in the railroad industry by collective bargaining (Pet. Br. 5, 8).

While, as the Solicitor General points out, the number of State Belt employees is small compared to the total

number of state employees (U. S. Br. 11), still, it is an annoying incongruity that California would have to collectively bargain with its State Belt employees at San Francisco Harbor, while, because of the exemption in the Labor Management Act (Pet. Br. 33), its other harbor employees can remain under civil service (Pet. Br. 33-34).

While the brief for the United States suggests that "collective bargaining with reference to public employment is no rarity" (p. 12), the California Supreme Court has said:

"Recent authorities hold uniformly that the wages, hours and working conditions of government employees must be fixed by statute or ordinance. . . ." (37 Cal.2d 412, 417, 232 P.2d 857, 861.)

The opinion of the Courts and authorities are overwhelmingly to the effect that the states and their political subdivisions do not and cannot have the authority to establish working conditions for public employees through collective bargaining (Rhyne, Labor Unions and Municipal Employee Law, 1946, Conclusions 3, 7, pp. 150-152; Supp. Rep.—1949—Conclusion 2, p. 56). Aside from some very limited situations, usually involving public corporations with broad powers, the federal government does not, and possibly cannot, establish working conditions by collective bargaining in the manner provided in the Railway Labor Act. No more forceful statement has been made on the subject than that given by President Franklin D. Roosevelt, setting forth the "insurmountable limitations" upon the use of the collective bargaining process in public service (*City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W. 2d 539, 542-543; Rhyne, *supra* pp. 436-437).

III.

CONTRARY TO RESPONDENTS' SUGGESTION, THE ELEVENTH AMENDMENT IS A SPECIFIC LIMITATION ON THE POWERS OF CONGRESS.

Respondents do not question California's analysis (Pet. Br. 41-51) that Congress relied upon an exercise of the federal judicial power at the instance of private parties as an essential device for the accomplishment of the purposes of the Railway Labor Act, nor do they argue that employment of this power against state-owned and operated railroads, such as the California Belt Line, would not constitute a suit against the State. Respondents' sole reply to these contentions of California rests on the sweeping and novel assertion that Congress in the exercise of a granted power, in this case the commerce power, may abrogate the Eleventh Amendment and confer jurisdiction on the federal courts over actions by private parties against a state (Resp. Br. 42-48).

Apparently unable to adduce direct support for this proposition from either precedent or principle, respondents attempt to create a spurious implication that the immunity guaranteed to the states by the Eleventh Amendment has been regarded with disfavor and limited by this Court at every opportunity. The suggestion, by inference at least, is that this Court should seize upon any pretext to emasculate the Eleventh Amendment in order to be consistent with the trend of its prior decisions. In fact, however, this Court's historical treatment of the Eleventh Amendment has been far from a uniformly narrow one. Indeed, if one wishes to analyze the trend of decision, it becomes necessary to clearly distinguish between two basic

concepts. On the one hand, there has been a tendency to limit the scope of the word "state" and the number of persons or entities which may bring themselves within the protective magic of the word. On the other hand, the Court has repeatedly resisted attempts to infringe the measure of immunity afforded where the conclusion is once reached that the action is, in fact, one against a state. The area within the curtilage has been restricted but the impermeability of the barricade itself has been steadfastly maintained. Thus, there have been many cases in which claims of immunity under the Eleventh Amendment have been denied on the theory that the suits were not in fact against states (*Bank of the U.S. v. Planters' Bank of Georgia* (1824), 22 U.S. (9 Wheat.) 904 and *Bank of Kentucky v. Wister* (1829), 27 U.S. (2 Pet.) 318 (state owned corporations); *Lincoln County v. Luning* (1890), 133 U.S. 529, and *Old Colony Trust Co. v. Seattle* (1926), 271 U.S. 426 (cities and counties); *Hopkins v. Clemson Agricultural College* (1911), 221 U.S. 636 (public corporation); *Georgia R.R. and Banking Co. v. Redwine* (1952), 342 U.S. 299, *Ex Parte Young* (1908), 209 U.S. 123; *Reagan v. Farmers' Loan & Trust Co.* (1894), 154 U.S. 362; *Tindal v. Wesley* (1896), 167 U.S. 204; (state officers acting without valid legal authority)). The cases relied on by respondents are principally of this category.

: Where the judgment or order contemplated by the action, however, would require payment from the state treasury, or would directly affect the property or financial interests of the state, or would command the exercise of discretionary authority vested in an officer by virtue of

his embodiment of the state's sovereignty, the suit is deemed to be one against the state (*Ford Motor Co. v. Dept. of Treas.* (1945), 323 U.S. 459; *Great Northern Life Ins. Co. v. Read* (1944), 322 U.S. 47; *Smith v. Reeves* (1900), 178 U.S. 436; *Hagood v. Southern* (1886), 117 U.S. 52; *Louisiana v. Jumel* (1883), 107 U.S. 711).

In cases where the preliminary conclusion has been reached that the suit is in fact against a state, the immunity has been sustained by this Court against all attempts to infringe or circumvent it. Though the amendment in its literal wording applies only to suits against a state by citizens of *another* state, it has been broadly construed to provide immunity where the suit was by a citizen of the defendant state (*Hans v. Louisiana* (1890), 134 U.S. 1), by a foreign sovereign (*Monaco v. Mississippi* (1934), 292 U.S. 313), and by a state acting as collection agent for its own citizens (*New Hampshire v. Louisiana* (1883), 108 U.S. 76). Moreover, the fact that in many of the cases the subject of the action as a case arising under the Constitution of the United States rather than the identity of the parties would have been the predicate of federal jurisdiction in the absence of the Eleventh Amendment has never been deemed material. (*Hans v. Louisiana* (1889), 134 U.S. 1). An early suggestion that immunity attached only where the state was named as a party of record (*Osborn v. Bank of United States* (1824), 22 U.S. (9 Wheat.) 737, 850-858), was shortly repudiated (*Governor of Georgia v. Madrazo* (1828), 26 U.S. (1 Pet.) 110, 120-123), and since that time the proper inquiry in every case has been whether the action is in substance against the state (*Smith v. Reeves* (1899), 178 U.S. 436, 438). And,

although the amendment speaks only of suits "in law or equity", it has been given effect as a limitation on the admiralty jurisdiction. (*Ex parte New York* (1920), 256 U.S. 490, 497).

A suggestion that the state lost its immunity by directly engaging in a proprietary, as distinguished from a governmental, activity was rejected in *Murray v. Wilson Distilling Co.* (1909), 213 U.S. 151. Finally, an earlier tendency to judicially broaden state consent statutes framed in general language but not expressly authorizing suit in the federal courts was abandoned by later decisions which require a clear expression of such consent, at least in cases involving the state's financial affairs (*Compare Reagan v. Farmers' Loan & Trust Co.* (1893), 154 U.S. 362, 391-392, with *Great Northern Life Ins. Co. v. Read*, (1944), 322 U.S. 47, 53-57 and *Kennecott Copper Corp. v. State Tax Com.* (1946), 327 U.S. 573, 577).

These cases demonstrate the error in any suggestion that the sovereign immunity of the states, insofar as the federal judicial power is concerned, has been whittled away by this Court to a point where the proposition advanced by respondents can be regarded as merely the culmination of a natural trend of decision. To suggest that the principle of the Eleventh Amendment died with the Nineteenth century is to ignore the vitality accorded the constitutional limitation by recent decisions of this Court. The proposition asserted by respondents is an astounding one, the acceptance of which would require the repudiation of the Court's historical attitude toward the Eleventh Amendment.

But this is scarcely the gravest implication of respondents' position. The Eleventh Amendment is a specific limitation upon the judicial power vested in the federal government (*Duhne v. New Jersey* (1920), 251 U.S. 311, 313). As such it is intrinsically a specific limitation not upon the self-assumed powers of the federal courts but upon the powers which Congress may vest in the federal courts. The immediate source of the power exercised by the lower federal courts is not Article III, but Congress itself (*Kline v. Burke Const. Co.* (1922), 260 U.S. 226, 233; *Sheldon v. Sill* (1850), 49 U.S. (8 How.) 441, 448; *Cary v. Curtis* (1845), 44 U.S. (3 How.) 236, 244). Thus, every case in which a state's claim of immunity under the Eleventh Amendment has been sustained is in effect a holding that the act of Congress conferring the jurisdiction on the federal courts is invalid. For if there were no appropriate grounds for federal jurisdiction in the absence of the amendment, the Court presumably would not have found it necessary to reach the question of immunity.

The Eleventh Amendment, therefore, is a specific limitation on the power of Congress. It is as fallacious to suggest that it is subservient to the commerce clause as it would be to assert that the limitations imposed by the First or the Fifth Amendments must yield to the overweening sweep of the commercial power. Respondents' view ignores the fact that the Eleventh Amendment is, after all, a part of the Constitution.

By the same token respondents' emphasis on the supremacy clause and its implications as to the precedence of federal law in any conflict with state interests is misplaced. The question in this case is not as to the supremacy

of federal law over state law, but as to the supremacy of the specific constitutional limitations on Congressional power and their significance in ascertaining the intent behind general language in an act of Congress.

The only real question in any case involving a claim of immunity is whether the action is in fact against the state. No clearer instances of actions which would be in substance against the state can be imagined than those contemplated for the enforcement of the Railway Labor Act. Suits on Adjustment Board awards frequently result either in money judgments which would be payable from the state treasury or in injunctions affirmatively commanding the state to alter the relationships among its servants. All of the claims involved in the present proceeding, except possibly one, seek money awards. (Pet. Br., pp. 6-7). Moreover, nothing could be more fundamentally a suit against a state than a proceeding designed ultimately to force the state legislature to abandon its powers over the rates of pay, qualifications, and other terms of employment of state employees and provide for the establishment of these conditions by collective bargaining.

IV.

RESPONDENTS CONTEND THAT A STATE'S EMPLOYER-EMPLOYEE RELATIONSHIP CAN BE CONTROLLED BY THE FEDERAL GOVERNMENT IN THE MANNER OF THE RAILWAY LABOR ACT.

If the Court decides that the Railway Labor Act is applicable to the state, then the constitutional issue is joined (Pet. Br. 51-61). The right of the states as constituent parties of the Union to choose and set terms of employ-

ment for officers and employees carrying out state functions, free from interference of the federal government, has always been recognized as a fundamental concept of the federal plan. It is basic to the republican form of government which the central government is constitutionally bound to guarantee (U. S. Const. art IV, sec. 4).³

It is difficult to perceive how the states may continue to exist as independent agencies of the constitutional plan, if Congress, under the commerce power, may control a state's employer-employee relationship (cf. *Johnson v. Maryland*, 254 U.S. 51, 57). The very existence of states often determines interstate commerce itself and what states do, affects it. Yet, respondents contend that Congress under the commerce power and supremacy clause may require a state to manage its relationship with its employees pursuant to the Railway Labor Act. The other side of the coin, is that the requirements of this act and the federal policing of the employment relationship, impinges upon the hitherto acknowledged right of the people to set the conditions upon which their employees will carry out state functions.

The authorities cited by respondents in support of respondents' contention concern, for the most part, the exercise of the federal taxing power. None of the authorities cited touch on the state as an employer (Resp. Br. 31-42). Respondents place almost final and conclusive reliance on *U. S. v. California*, 297 U.S. 175, and the Solicitor General declares that the case "puts at rest the constitutionality

³"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence." (U.S. Const. art. IV, sec. 4).

of the Railway Labor Act as applied to the Belt Railroad." (U.S. Br. 13.) It would require the ardor of advocacy to fail to see that, in the exercise of control over interstate railroad commerce, there is a distinction between requiring safety appliances on railroad cars and controlling and policing the employment relationship through which state employees carry out legitimate functions of a state in interstate commerce.

Perhaps it will be unnecessary for the Court to reach the basic and hitherto unsettled constitutional question, because respondents place their claim that the federal government has the right to subject the State Belt to the controls of the Railway Labor Act, upon the following proposition:

"A state which chooses to engage in what are normally private enterprises as contrasted with its traditional governmental functions, is subject to regulation by the Federal Government." (Resp. Br. 31).

While California in the operation of the State Belt is engaged in a proprietary function, the matter of a state's relationship with its employees, regardless of the activity in which the employees are engaged is governmental in character (Pet. Br. 59-60). This is clearly indicated by *Nutter v. City of Santa Monica*, 74 Cal. App. 2d 292, 302, 168 P. 2d 741, 748; *City of Los Angeles v. Los Angeles etc., Council*, 94 Cal. App. 2d 36, 45-46, 210 P. 2d 305, 311; *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W. 2d 539. The California Supreme Court declared, with respect to the situation now before the Court:

"We find no legitimate reason for making any distinction in the present case between governmental and

proprietary functions of the state." (*State v. Brotherhoods*, 37 Cal. 2d 412, 420-421, 232 P. 2d 857, 863).

V.

EVEN IF THE RAILWAY LABOR ACT REQUIRES A STATE TO COLLECTIVELY BARGAIN, RESPONDENTS FAIL TO SHOW THAT THEIR CLAIMS ARE BASED UPON A VALID CONTRACT.

The Railway Labor Act provides for the negotiation of employment contracts. The act, however, does not change the principles of contract law that an agent must have *authority* to bind his principal. It is evident that the Harbor Board had no authority to negotiate the present contract on behalf of the state (Pet. Br. 66-69). In fact, respondents re-emphasize the conclusion by stating that "the Harbor Board has no authority to bargain to a conclusion on any subject" (Resp. Br. 20). The civil service laws to which respondents refer, merely demonstrate, not only the absence of an over-all authority to make a collective bargaining contract, but that, as to a number of particular matters such as promotions and layoffs, specifically there was no authority to bind California to the conflicting provisions in the contract (Pet. for Cert. 84).

However, respondents contend that the civil service laws were an impediment to the collective bargaining process (Rep. Br. 17). What is the result? California, because of these laws, had not designated anyone to establish working conditions for its State Belt employees, and, in fact, by its civil service laws had precluded bargaining entirely. However, that does not give validity to the present contract made by unauthorized persons. Voluntary agree-

ment is the essence of the act (Natl. Med. Bd. 21st Ann. Rep., 1955, p. 4). Hence, up to the present time, the most that has occurred, is that California has not complied with the provisions of the act requiring a carrier to designate representatives "authorized" to "confer," and because of the restrictions of civil service statutes, has not engaged in collective bargaining with representatives of its State Belt employees for the purpose of establishing rates of pay, rules and working conditions (45 U.S.C. sec. 152, First, Second). Without considering the problems posed by the fact that the carrier is a state, these obligations may be enforced by injunction (*Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515).

If any agency other than the legislature would have implied powers to discharge the state's obligation to collectively bargain, it is and was the State Personnel Board, which is given full jurisdiction concerning rates of pay and working conditions (Calif. Gov. C. secs. 18702-18714). Otherwise, if California refuses to bargain, the act provides for taking the dispute to the Mediation Board (45 U.S.C. sec. 155). In any event, if California is to be required to collectively bargain, it should have an opportunity to empower its representatives to act for it, free of the limitations presently imposed by civil service laws.

CONCLUSION.

Respondents have not demonstrated that the Railway Labor Act expressly includes the states. Nor have they produced affirmative reasons for believing that Congress intended the act to require a state to give up its tradi-

tional method of establishing working conditions for its employees by statute and to substitute therefor, collective bargaining—something foreign to state public service. The Eleventh Amendment cannot be overridden by the commerce power, as respondents suggest. Since judicial action by private parties for the enforcement of rights is a basic part of the act, it is not likely that Congress intended the act to apply to a state.

Despite the full sweep of the commerce power, there is an implied limitation that Congress cannot employ it to the extent of controlling a state's intrinsic right to select the terms upon which its officers and employees will carry out state functions. Even if the act applies to a state, there is no valid contract upon which the Adjustment Board's jurisdiction may rest, for the instant contract upon which respondents' claims are based, was not executed by state officers empowered by California to engage in collective bargaining with the representative of respondents.

Petitioner respectfully suggests that the conclusion remains that the judgment should be reversed.

Dated, March 29, 1947.

Respectfully submitted,

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OCT 3 1956

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. 385

STATE OF CALIFORNIA,

Petitioner,

vs.

HARRY TAYLOR, PETER A. CALUS, JAMES W.
BREWSTER, WILLIAM J. LANGSTON AND H. C.
GREER,

Respondents,

AND

L. B. FEE, ET AL., ETC., ET AL.,

Respondents.

**BRIEF OF RESPONDENTS HARRY TAYLOR, PETER
A. CALUS, JAMES W. BREWSTER, WILLIAM J.
LANGSTON AND H. C. GREER IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI.**

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STATEMENT OF THE CASE.

These respondents find no misstatements in the Statement of the Case in the Petition for a Writ of Certiorari (Petition, pp. 4-9). However, these respondents believe that the second paragraph of page 4 of the Petition may give the impression that the entire Civil Service System of the State of California is involved in this suit.

Such is not the case. The present litigation concerns the applicability of the Railway Labor Act to the State Belt Railroad of California, which is owned and operated by that State (R. 6). The Record does not disclose that the State so owns or operates any other railroad. The lines of the State Belt Railroad extend along the water front of San Francisco harbor (R. 6). It has in its service from 125 to 150 employees, included among whom are locomotive firemen and engineers and trainmen (R. 6-7). The collective bargaining agreement affected in this suit is that made on behalf of the crafts of locomotive firemen, of locomotive engineers, and of trainmen. There is no showing in the Record that any other employees of the State Belt Railroad have a collective bargaining agreement.

Nor does the Record disclose that the State of California owns other commercial or industrial enterprises that will be affected by Federal laws similar to the Railway Labor Act and which may therefore concern the Civil Service System of the State of California.

ARGUMENT.

WHY THE WRIT SHOULD NOT BE GRANTED.

A. Conflict Between Seventh and Fifth Circuits and California Supreme Court.

The Petitioner, California, relies on the conflict between the decision of the California Supreme Court, on the one hand, and the decisions of the Seventh Circuit and of the Fifth Circuit, on the other hand, as a basis for the granting of the writ of certiorari (Petition, p. 10).

Such a conflict is not listed in Rule 19 of this Court among "the character of reason which will be considered" pertaining to the exercise by this Court of its discretion.

Further, it should be observed that this Court denied the petition for writ of certiorari in the California Supreme Court case in *Brotherhood of Railroad Trainmen v. State of California*, 342 U. S. 876, 96 L. ed. 658. In commenting on this denial of the writ the Fifth Circuit said in *New Orleans Public Belt R. Com'n v. Ward*, 195 F. 2d 829, in note 2 appearing at the bottom of page 830:

"* * * Moreover, the California Supreme Court's decision was based in part on a non-federal ground. 37 Cal. 2d 412, 232 P. 2d 857, 863. The United States Supreme Court has consistently adhered to the principle that it will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question be involved and perhaps wrongly decided. *Murdock v. Memphis*, 20 Wall. 590, 636, 22 L. Ed. 429; *Berea College v. Kentucky*, 211 U. S. 45, 53, 29 S. Ct. 33, 53 L. Ed. 81; *Fox Film Corp. v. Muller*, 296 U. S. 207, 56 S. Ct. 183, 80 L. Ed. 158; *Herb v. Pitcairn*, 324 U. S. 117, 125-126, 65 S. Ct. 459, 89 L. Ed. 789."

These Respondents therefore urge that conflict between the Seventh and Fifth Circuits and the California Supreme Court affords no reason for the granting of the writ of certiorari.

B. Importance of the Issues.

1. In stating in its Petition its idea of the Questions Presented (Petition, pp. 2-3) California thus puts the first question:

1. "Whether Congress intended the general provisions of the Railway Labor Act (45 U. S. C. s. 151 *et seq.*), providing for collective bargaining and enforcement of collective bargaining contracts in interstate railroad commerce, to apply to a State?"

California discusses this point at pages 10-13 of its Petition.

At pages 10 and 11 of its argument California declares:

"... the Seventh Circuit's discovery in the general language of section 1 of the Railway Labor Act of an intention to require the State to displace its present procedures and collectively bargain with its Belt Line employees has a potentially far-reaching impact on the administration of State government."

As these Respondents have already observed in their Statement of the Case, this litigation concerns only locomotive firemen, engineers, and trainmen of a Railroad which employs no more than some 125 to 150 persons. California itself refers to the Railroad as "a local switching railroad" (Petition, p. 18). It is difficult to believe that action taken in this suit with respect to such a relatively small number of employees of a small railroad which appears to be the only one owned or operated by California "has a potentially far-reaching impact on the administration of State government."

There has been no showing in the Petition that California owns or operates any other businesses which will be affected by the application of the Railway Labor Act to the State Belt Railroad or that such application will upset "the administration of State government" or wreck the entire Civil Service System of California.

In this connection it is interesting to note that the holding of this Court that California in its operation of the State Belt Railroad is subject to the Federal Safety Appliance Act (*United States v. California*, 297 U. S. 175, 80 L. ed. 567), and the holding of a California court that the Railroad is subject to the Federal Employers Liability Act (*Maurice v. State of California*, 43 Cal. App. 2d 275, 110 P. 2d 706), and the holding of the Ninth Circuit that the Railroad is subject to the Federal Carriers Taxing Act (*State of California v. Anglim*, 129 F. 2d 455) do not appear to have had any "far-reaching impact on the administration of State government."

These respondents suppose that at some future time a case will arise in which the exercise by the Congress of its constitutional power to regulate commerce is shown to cause serious interference with the administration of State government. These respondents would have no objection to the granting of the writ of certiorari to resolve such a question. But these respondents believe that they would have to be alarmists indeed to see with California that the decision sought to be reviewed "has a potentially far-reaching impact on the administration of State government." Certainly the Petition now under consideration, with its application limited to a few employees of a small railroad which appears to be the only California railroad in such a position, is not an appropriate vehicle for a decision of the nature suggested.

2, 3 and 4. At page 3 of its Petition California thus

states the second, third and fourth questions which it believes to be presented:

"2. If the Act applies to a State operated railroad, whether Congress has the constitutional authority in the manner of the Railway Labor Act to control a State's employer-employee relationship?

3. Whether the contract enforcement procedures invoked herein against a State, are prohibited by the Eleventh Amendment to the United States Constitution?

4. Whether the Railroad Adjustment Board can be ordered to make awards under a collective bargaining contract, which is in conflict with and violates the civil service laws of California?"

In its argument on "Importance of the Issues" California discusses these questions at pages 13-16 of its Petition.

None of these three questions was passed on by the Seventh Circuit, or, for that matter, by the District Court. To quote from page 8 of the Petition:

"It will be noted that the District Court did not pass upon the issue of constitutionality, the bar of the Eleventh Amendment, the invalidity of the contract because it violated California civil service laws, * * * the Circuit Court treated all these important and decisive issues as waived (App. A, p. 17)."

In discussing this waiver, the Seventh Circuit, as set forth at pages 17-18 of the Appendices of the Petition, declared:

"Under the heading 'position of State of California on other issues', the state contends *inter alia* that, if the contract is valid and may be enforced, the authority of the Adjustment Board to decide the instant claims is precluded by the provision in the contract that a system board—the State Personnel Board—shall hear and decide these claims (citing 45 U. S. C. A. §153—Second). In its brief herein the state makes no further reference to this contention ignoring it in

its 'summary of argument', 'propositions of law relied on and citations of authorities' and in the body of its argument. (See rule 16 of this court referring to the contents of briefs.) No reference thereto was made in oral argument before this court. Under these circumstances we treat this contention as waived. For the same reason we consider as waived in this court the contentions of the state set forth in the footnote.¹⁷

The Seventh Circuit correctly held that California had waived the three above listed points which it now asks this Court to decide. In the appeal which these respondents took from the District Court to the Seventh Circuit it behooved California to assert all of its defenses against the plaintiffs' (respondents') action that it had asserted before the District Court. This is true for the simple reason that if the Seventh Circuit disagreed with and overruled the one ground upon which the District Court had predicated its decision dismissing plaintiffs' complaint, to-wit, the plea of *res judicata*, California's remaining defenses against plaintiffs' action would have been before the Seventh Circuit for consideration and decision.

The rule that an appellee may urge any matter appearing in the record in support of the decree appealed from, even though the appellee's argument involves reliance on a matter ignored by the lower court, was recently referred to by the Seventh Circuit in *Gallagher & Speck, Inc. v. Ford*

17. " * * * (c) If the Railroad Labor Act is held to be applicable to the State of California, then the Act is an unconstitutional interference with a state's relationship with its employees. (d) The contract is also invalid because the Harbor Board lacked authority to negotiate terms of the contract in conflict with the State Constitution and civil service laws. * * * (f) If, nevertheless, the Adjustment Board does have jurisdiction over these claims the Board should not be required to render awards because such awards could not be enforced against the State of California in the Federal courts as the Railway Labor Act provides, because of the inhibition of the Eleventh Amendment of the United States Constitution."

Motor Company, 226 F. 2d 728. At page 731 of its opinion the Seventh Circuit said:

“Though the district court does not seem to have relied on the effect of the War Powers Act and the President’s proclamation, defendant is entitled to rely upon same in support of the judgment below. As the Supreme Court said, in *United States v. American Ry. Express Co.*, 265 U. S. 425, at page 435, 44 S. Ct. 560, at page 564, 68 L. Ed. 1087; ‘* * * it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.’”

See also:

United States v. American Railway Express Co.,
265 U. S. 425, 68 L. ed. 1087.

Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 81 L. ed. 593.

But this California did not do. It sought instead to concentrate upon sustaining the ruling of the District Court based on the plea of *res judicata*. California did not continue to assert by argument and brief its defenses that if the Railway Labor Act is held to be applicable to the State of California, then the Act is an unconstitutional interference with a State’s relationship with its employees, or its defenses based on the Eleventh Amendment, or that the State Belt Railroad lacked authority to make a collective bargaining contract which is in conflict with California laws, and that the National Railroad Adjustment Board therefore cannot be ordered to make awards under such a contract.

Thus California waived these defenses. As the Seventh Circuit said in *Hubshman v. Louis Keer Shoe Co.*, 129 F. 2d 137, at page 142:

"Several other questions as to the court's refusal to receive certain evidence, etc., are mentioned in the brief. The matters are not argued and no authorities were cited to sustain plaintiffs' suggestion of error, and we consider the points waived if they had any merit."

To the same effect is:

Southeastern Express Company v. Robertson, 264 U. S. 541, 542, 68 L. ed. 840, 841.

Of course the writ of certiorari will not issue merely to accord another hearing to the party defeated in the Court of Appeals. As this Court said in *Magnum Import Co. v. De Spoturno Coty*, 262 U. S. 159, 163, 67 L. ed. 922, 924:

"The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Inasmuch as California has only itself to blame for the fact that the Seventh Circuit did not pass on the three questions which it now wishes this Court to resolve, no reason occurs to these respondents to prevent the application of the usual rule to California, namely, that the questions which the petitioner seeks to have this Court consider must have been duly raised and considered in the court below. This Court thus stated the rule in *New York Dock Co. v. Steamship Poznan*, 274 U. S. 117, 123, 71 L. ed. 955, 959:

"Respondent attempts to raise here questions with respect to the amount of recovery which were neither raised nor considered below. We have examined them only so far as is necessary to ascertain that no error was committed by the district court so plain or apparent as to warrant our consideration on such a state of the record."

Again, this Court said in *Calmar Steamship Corp. v. U. S.*, 345 U. S. 446, 456, 97 L. ed. 1140, 1147:

"We do not consider the merits of Calmar's claims against the United States, which the Court of Appeals did not, in view of its disposition of the libel, pass on."

Finally, the petition for a writ of certiorari in a case may raise important questions but the record may be cloudy, and it may be desirable to have different aspects of an issue further illumined by the lower courts. As this Court said in *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 917-918, 94 L. ed. 562, 565-566:

"A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."

The inaction of California in the Seventh Circuit has resulted in a "cloudy" Record which does not entitle California to the granting of a writ of certiorari.

Inasmuch as questions 2, 3, and 4 were not urged to or considered by the Seventh Circuit, this Court need not grant its writ to pass on them at this time.

C. Whether Decisions Pertaining to the Application of Other Federal Statutes to the State Belt Railroad Are Determinative.

As a final reason for the granting of the writ of certiorari, California is forced into the negative approach of attempting to show that earlier decisions concerning the State Belt Railroad, including a decision by this Court, have not already established that the Railroad is subject to the Railway Labor Act. To quote from page 16 of California's petition:

"C. DECISIONS PERTAINING TO THE APPLICATION OF OTHER FEDERAL STATUTES TO THE STATE BELT RAILROAD ARE NOT DETERMINATIVE.

"Because Federal statutes concerning safety appliances (*U. S. v. California*, 297 U. S. 175); rules of tort liability (*Maurice v. California*, 43 Cal. App. 2d 275, 110 P. 2d 706) and taxes (*California v. Anglim* (9th Cir.), 129 F. 2d 455) have been held to apply to a State as well as private carriers, it does not follow that all Congressional assertions of the commerce power can be applied against a State."

The Petition fails to state that each of these decisions concerned the State Belt Railroad, the very carrier which is the subject of the present suit.

In holding the Railroad subject to the Federal Safety Appliance Act this Court said in *U. S. v. California*, 297 U. S. 175, 189, 80 L. ed. 421:

"2. The state urges that it is not subject to the federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, see *Sherman v. United States*, 282 U. S. 25, 75 L. ed. 143, 51 S. Ct. 41, *supra*; *Denning v. State*, 123 Cal. 316, 55 P. 1000, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act. In any case it is argued that the statute is not to be construed as applying to the state acting in that capacity.

"Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. See *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619, 624, 78 L. ed. 1025, 1029, 54 S. Ct. 542; *Green v. Frazier*, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; *Jones v. Portland*, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 112, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce. *United States v. Louisiana*, 290 U. S. 70, 74, 75, 78 L. ed. 181, 184, 185, 54 S. Ct. 28; *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 66 L. ed. 371, 42 S. Ct. 232, 22

A. L. R. 1086; Shreveport Rate Cases (Houston, E. & W. T. R. Co. v. United States), 234 U. S. 342, 58 L. ed. 1341, 34 S. Ct. 833. A contract between a state and a rail carrier fixing intrastate rates is subject to regulation and control by Congress, acting within the commerce clause, *New York v. United States*, 257 U. S. 591, 66 L. ed. 385, 42 S. Ct. 239, as are state agencies created to effect a public purpose, see *Sanitary Dist. v. United States*, 266 U. S. 405, 69 L. ed. 352, 45 S. Ct. 176; *University of Illinois v. United States*, 289 U. S. 48, 77 L. ed. 1025, 53 S. Ct. 509; see *Georgia v. Chattanooga*, 264 U. S. 472, 68 L. ed. 796, 44 S. Ct. 369. In each case the power of the state is subordinate to the constitutional exercise of the granted federal power."

This Court has already so thoroughly established the principle that the State Belt Railroad is subject to Federal law that the question of whether the Federal Railway Labor Act applies to the Railroad affords no reason to grant the writ of certiorari in the present case.

CONCLUSION.

The conflict between the Seventh and Fifth Circuits, on the one hand, and the California Supreme Court, on the other, affords no support for a petition which seeks a review of the Seventh Circuit decision.

The application of the Railway Labor Act to the California State Belt Railroad is not shown to have a far-reaching effect on the administration of State government, and presents no important issue.

The questions of whether Congress has the constitutional authority in the manner of the Railway Labor Act to control a State's employer-employee relationship, of whether the Eleventh Amendment prohibits the contract enforcement procedures and of whether the National Railroad Adjustment Board can be ordered to make awards under a collective bargaining agreement which is in conflict with

the civil service laws of California were not argued to or considered by the Court of Appeals, and therefore need not be considered by this Court.

Decisions pertaining to the application of other Federal statutes to the State Belt Railroad, including particularly the decision of this Court that the Railroad is subject to the Federal Safety Appliance Act, are determinative that the Railroad is subject to the Railway Labor Act.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

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JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

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STATE OF CALIFORNIA,

Petitioner,

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HARRY TAYLOR, PETER A. CALUS, JAMES W.
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**BRIEF FOR RESPONDENTS HARRY TAYLOR, PETER
A. CALUS, JAMES W. BREWSTER, WILLIAM J.
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March 7, 1957.

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OPINIONS BELOW.

The memorandum opinion of the District Court is reported in 132 F. Supp. 356.

CONSTITUTIONAL PROVISIONS.

These respondents add to "Statutes Involved", found at pages 2-3 of the Petitioner's Brief, the following: Section 8, Clause 3, Regulation of Commerce, of Article 1 of the Constitution of the United States, as follows:

The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; (USCA Constitution Art. 1 § 1 to Art. 1 § 9, pp. 169, 200).

The second paragraph of Article 6 of the Constitution which reads as follows:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

QUESTIONS PRESENTED.

The statement by the Petitioner at page 2 of its Brief of “Questions Presented” includes only two questions.

The first of these appears to be the question listed as 1 at pages 2 and 3 of the Petition for a Writ of Certiorari.

The second question presented at page 2 of the Petitioner’s Brief appears to be that listed as 4, at page 3 of the Petition for a Writ of Certiorari.

These respondents are aware that the phrasing of the questions presented in the Petitioner’s Brief need not be identical with that set forth in the Petition for Certiorari, and that the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

Nevertheless, to be certain that the questions presented for review are expressed in the terms and circumstances of the case, these respondents add to the list of Questions Presented the following two questions as listed at page 3 of the Petition for a Writ of Certiorari:

“2. If the Act applies to a State operated railroad, whether Congress has the constitutional authority in the manner of the Railway Labor Act to control a State’s employer-employee relationship? .

3. Whether the contract enforcement procedures invoked herein against a State, are prohibited by the

Eleventh Amendment to the United States Constitution!"

STATEMENT OF THE CASE.

The Petitioner makes two references to the brief of these respondents in the United States Court of Appeals for the Seventh Circuit (Petitioner's Brief, pp. 9 and 13) and one reference to the brief of the "carrier members" before that Court (Petitioner's Brief, p. 13). Neither of these briefs is in the record before this Court.

In speaking of the suit brought by these respondents in the District Court for an order to require the First Division of the National Railroad Adjustment Board to consider and decide their claims, the Petitioner states that these respondents sought "an injunction against the carrier members and Executive Secretary of the First Division * * *" (Petitioner's Brief, p. 9). Actually, these respondents sought an injunction against *all* the members of the First Division, that is, the five carrier members and the five labor members, as well as against the Executive Secretary (R. 5-6, 10).

The Petitioner declares at page 12 of its Brief that the District Court upheld the contention of the carrier members that the Adjustment Board lacked jurisdiction to decide certain basic disputes raised by the pleadings. These respondents do not agree with the Petitioner's statement, but the respondents do not consider that this issue has any bearing on the questions posed for decision by this Court by the Petitioner's Petition for a Writ of Certiorari.

It might be wondered on reading the Petitioner's Statement of the facts what had become of the issues of *res judicata* (Petitioner's Brief, pp. 11, 12, and 15), of necessity for approval of the contract by the California Department of Finance (Petitioner's Brief, pp. 9 and 12), and of the contention that the California State Personnel

Board, rather than the Adjustment Board, has jurisdiction of the claims of these respondents (Petitioner's Brief, pp. 11-12).

Each of these three points has been eliminated from the case in this Court (page 9 of the Petition for a Writ of Certiorari).

SUMMARY OF ARGUMENT.

I.

A railroad that is a common carrier engaged in interstate commerce is subject to the Railway Labor Act even though owned by a state.

California contends that the Congress did not intend the Railway Labor Act to apply to state-owned railroads, and refers to the alleged general rule that a statute will not be applied to a sovereign in the absence of express words to that effect.

These respondents point out that had Congress intended to exclude state-owned railroads the Act would have said so.

This Court has held that California, as the owner of the State Belt Railroad in question, must comply with the Federal Safety Appliance Act. A California court has held the State to be subject to the Federal Employers' Liability Acts, and a Federal decision has held the State subject to the Federal Carriers Taxing Act in its operation of the State Belt Railroad.

The definition of the word "carrier" adopted by the Congress in writing the Railway Labor Act is broad, and contains no hint that a state-owner of an interstate railroad is to be exempt.

A decision of the United States Court of Appeals for the Fifth Circuit has held that the Railway Labor Act applies to an interstate railroad owned by a city.

The Congressional plan for the regulation of the general steam-railroad interstate system of transportation by means of the Railway Labor Act leads to the conclusion that an interstate carrier is subject to the Act even though owned by a state.

II.

The requirement of the Railway Labor Act that rates of pay, rules and working conditions of railway employees be established by collective bargaining excludes their dictation by California legislative and administrative action.

California wishes a free hand in dictating the terms and conditions of employment of the persons who operate the State Belt Railroad. California proposes to control their employment through its civil service laws and administrative regulations. These often conflict with the terms of the collective bargaining agreement of September 1, 1942 negotiated with the Board of State Harbor Commissioners for the railroad with the two labor organizations which represented operating employees pursuant to the Railway Labor Act.

The meaning of "collective bargaining" is not spelled out in the Railway Labor Act. However, decisions of this Court make it clear that the system proposed by California is the very antithesis of establishing rules and working conditions by employers and employees facing each other across the bargaining table, as contemplated by the Railway Labor Act. The Act excludes the dictation of terms and conditions of employment by California laws and regulations.

III.

The sovereign power reserved to the states is subordinate to the power vested in the Federal Government to regulate the subjects enumerated in Article 1, Section 8, of the Constitution.

California argues that a fundamental attribute of state sovereignty is the state's right to establish the terms upon which its employees will carry out state functions, and that the application of the Railway Labor Act to it, as a State, raises serious questions of constitutional power.

California overlooks the fact that the Constitution of the United States grants to the Congress the power to regulate commerce among the states, and that the Constitution and the laws of the United States made in pursuance thereof are supreme.

Numerous decisions of this Court which have considered this problem note that when a state chooses to engage in what is normally private enterprise, as contrasted with its traditional governmental functions, it is subject to regulation by the Federal Government.

This Court has held that the State Belt Railroad involved in this litigation is subject to the Federal Safety Appliance Act adopted by the Congress under interstate-commerce powers.

The imposition of collective bargaining on the State of California in its operation of the State Belt Railroad is an incident of the Federal Government's supreme authority under the commerce clause of the Constitution.

IV.

The Eleventh Amendment is not a bar to the application of the Railway Labor Act to a common carrier engaged in interstate commerce when owned by a state.

California argues that inasmuch as enforcement provisions of the Railway Labor Act require use of federal judicial power at the instance of private parties, the Congress could not have intended that the Act apply to carriers owned by a state, because the Eleventh Amendment would prevent an enforcement suit.

The Eleventh Amendment would not prevent whatever enforcement suits might be required.

In its practical operation this Amendment has been the subject of frequent interpretation by this Court and many of these decisions have held that the Eleventh Amendment does not forbid a suit against a state officer or agency.

Article 6 of the Constitution established the supremacy of the Constitution and the laws of the United States made pursuant thereto. Article 1, Section 8, grants the Congress power to regulate interstate commerce.

Although adoption of the Eleventh Amendment apparently was prompted by a high regard for the sovereignty and dignity of the states, the current trend is against "legal irresponsibility" on the part of the states and of the Federal Government. The State of California has been a part of this trend.

The basic question is whether the protection afforded the States by the Eleventh Amendment is subordinate to the authority vested in the Federal Government by Article 1, Section 8. Although the precise problem posed is original and is believed to be without precedent in the decisions of this Court, these respondents urge that, in view of the consequences which would follow the subordination of the authority of the Federal Government to the interdiction of the Eleventh Amendment, the power of the Federal Government must be held supreme.

V.

A brief *amicus curiae* has been filed by the California State Employees' Association. In general, the Association argues that the rights and benefits which the employees of the State Belt Railroad enjoy under the collective bargaining agreement negotiated by the Brotherhoods as their representatives are less favorable than would be their rights and benefits if the rates, rules, and working conditions were fully subject to the California state law and administrative regulations.

The answer to this contention is that the Brotherhoods were freely chosen by the operating employees of the State Belt Railroad to be their craft representatives, and it is reasonable to suppose that if a majority of the operating employees preferred that their employment relationships be governed by the California law and administrative regulations, they could readily substitute the Association for the Brotherhoods as their collective bargaining representatives.

ARGUMENT.

I.

A Railroad That Is a Common Carrier Engaged in Interstate Commerce Is Subject to the Railway Labor Act Notwithstanding It May Be Owned by a State.

The reasoning upon which the Petitioner predicated its conclusion that a state-owned railroad is not subject to the Railway Labor Act is stated succinctly in the following quotation from the decision of the Supreme Court of California:

“The Railway Labor Act does not *expressly apply* to state-owned railroads, 45 U.S.C.A: § 151, and it is well settled that statutes which in general terms divest pre-existing rights or privileges will not be applied to a sovereign, in the absence of express words to that effect, unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected.” (Italics ours.) *State v. Brotherhood of Railroad Trainmen*, 232 P. 2d 857, 860.

The California decision, as the above quotation discloses, is based upon an assumption that is occasionally employed in statutory construction. The numerous considerations that justify a decision contrary to that reached by the California court have been marshalled and discussed in other court opinions. We refer particularly to the summary of arguments contained in the opinion by the California District Court of Appeals rendered in the litigation between the State of California and the Brotherhoods, reported at 222 P. 2d 27, and the dissenting opinion filed by Associate Justice Carter of the California Supreme Court in the same case on appeal, reported at 232 P. 2d 857, 864 (pp. 35-45 of Appendices, Petition for a Writ of Cer-

tiorari). In rejecting the argument of the State of California that the Railway Labor Act does not apply to the State Belt because the Act did not expressly apply to state-owned railroads, Justice Carter declared:

"That Congress has 'consistently' excluded the state from labor laws—the third ground—is equally untenable. If that is true, then it supports my position, for Congress thought it must use language excluding the state when it desired to do so, and it did. But it did not employ such language in the Railway Labor Act and in the field of employer-employee relations in the railroad industry, and the courts have consistently held that the federal legislation includes the state.

"In speaking of the history of the act—the fourth ground—the majority approach is wholly negative. It is said that it gives no indication that the state as a carrier was to be included. But it gives no indication to the contrary. True, the act probably arose out of cooperation between the unions and private carriers, but no doubt the other federal railroad laws were similarly initiated" (p. 43, Appendices, Petition for a Writ of Certior. i).

This Court has held that the fact that the State of California is the owner and operator of the State Belt Railroad does not put the operation of the railroad beyond the requirement of complying with the Federal Safety Appliance Act. *United States v. State of California*, 297 U. S. 175. The controlling effect of this decision was emphasized by Associate Justice Carter in his dissenting opinion (232 P. 2d 864) as follows:

"In *United States v. State of California*, 297 U. S. 175 [56 S. Ct. 421, 80 L. Ed. 567], the same Belt Railroad was involved and the court was concerned with the federal Safety Appliance Act. 45 U. S. C. A. Sec. 1, *et seq.* That act has to do with standards of safety in train equipment. The particular problem presented was whether California was subject to the penal pro-

vision of the act for failing to comply with the safety standard. The court held that it was, and in so holding, stated principles which make it a binding precedent in the instant case. It found that the Belt Line is engaged in interstate commerce. A unanimous court said:

'The state urges that it is not subject to the federal Safety Appliance Act * * * it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, * * * it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act. In any case *it is argued that the statute is not to be construed as applying to the state acting in that capacity.*

'* * * The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. *The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution* * * *

'California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, * * * and to *safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate* * * *'

In *Maurice v. State of California*, 43 Cal. App. 2d 270, 110 P. 2d 706, the State Belt Railroad was held to be subject to the Federal Employers' Liability Acts (45 U. S. C. sec. 51, *et seq.*); and in *State of California v. Anglim*, 129 F. 2d 455, it was held to be subject to the Federal Carriers' Taxing Act (then 45 U. S. C. sec. 261, *et seq.*).

Of foremost importance in considering this question is the definition of the word "carrier" which the Congress adopted when writing the Railway Labor Act. The definition of "carrier" is found in Section 1, First, of the Act (45 U. S. C. sec. 151 First). Its essential part reads as follows:

"Section 1. When used in this Act and for the purposes of this Act—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, * * *."

The definition also declares:

"* * * *Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation * * *."

There are two aspects of this definition that are of special interest when pondering the question of whether state-owned railroads are subject to the act. First, the word "carrier" is not defined by the customary method of describing the character of organizations that the Congress had in mind. Instead, the Congress adopted the definition of "carrier" as contained in another act, to wit, the Interstate Commerce Act. This was accomplished merely by saying:

"The term 'carrier' includes any * * * carrier by railroad, subject to the Interstate Commerce Act."

This method of defining "carrier" ought logically to have the effect of making the geographical and jurisdictional scope of the Railway Labor Act identical with that of the Interstate Commerce Act. It would seem that, if a railroad is subject to the Interstate Commerce Act, the conclusion automatically follows that this railroad is also subject to the Railway Labor Act. Of this, more will be said later.

The second significant fact about the definition of "carrier" contained in the Railway Labor Act is that while "street, interurban, or suburban electric railway," when functioning in their normal manner, are not included in the definition of "carrier," yet such carriers are made subject to the Act when they are functioning as a "part of the general steam-railroad system of transportation." (45 U. S. C. sec. 151, First.) This feature of the definition clearly indicates a Congressional conviction that the regulatory scheme embodied in the Railway Labor Act for avoiding "interruption to commerce or to the operation of any carrier,"* shall be applicable to all parts of that vast network of rail communication upon which the flow of interstate commerce of our country is dependent. This indication of a determination on the part of Congress to bring the whole of "the general steam-railroad system of transportation" under the labor-management policy embodied in the Railway Labor Act tends strongly to negative the idea urged by the Petitioner, that important segments of the country's general transportation system are not encompassed by the requirements of this labor-management policy solely because the ownership of these segments happens to be vested in a state or its municipalities.

We now turn to the definition of "carrier" as contained

* 45 U. S. C., sec. 152, First.

in the Interstate Commerce Act. The carriers that are made subject to the Interstate Commerce Act are described, in the main, by the following quotation from that Act:

"(1) The provisions in this chapter shall apply to common carriers engaged in * * * the transportation of passengers or property wholly by railroad * * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia * * *."

Under this definition a railroad which lies wholly within one state will be subject to the Interstate Commerce Act if it *participates* in the movement of persons and property from one state to another. *United States v. Union Stock Yard*, 226 U. S. 286; *United States v. Illinois Terminal R. Co.*, 168 F. 546.

Whether the property used by the common carrier is owned by a corporation, a natural person, an association, a trust, or even by a political entity, appears to have no bearing upon the test thus laid down by the Act for determining whether a railroad shall be subject to the Act. The test, as we have seen, is a functional test. The courts have so held. For example, the City of New Orleans owns a railroad named the New Orleans Public Belt Railroad. This railroad is engaged in interstate commerce, and the question has arisen whether the fact that it is municipally owned would excuse it from complying with the Interstate Commerce Act. The courts have held that it is subject to the Act. See *City of New Orleans v. Texas & N. O. R. Co.*, 195 F. 2d 882, 884, and also *City of New Orleans v. Texas & Pac. Ry. Co.*, 195 F. 2d 887, 889.

The majority opinion issued by the California Supreme Court in the litigation between the State and the Brotherhoods stands alone in its holding that Congress intended

to exclude state-owned railroads from the requirements of the Railway Labor Act. This same question subsequently arose in a federal court case involving an enforcement proceeding based upon an award and order issued by the Adjustment Board requiring the New Orleans Public Belt Railroad Commission to reinstate a discharged employee. The enforcement of the award and order was resisted before the Court of Appeals for the Fifth Circuit primarily on the authority of the decision rendered by the California Supreme Court.

The Court of Appeals rejected the California Supreme Court decision as unsound, commenting as follows:

"We do not think that the decision of the California Supreme Court on the coverage of the Railway Labor Act, 45 U. S. C. A. § 151 *et seq.*, is consistent with one of the main designs of that act 'to avoid any interruption to commerce or to the operation of any carrier engaged therein' by requiring resort to the procedures it provides in the event of disputes 'before they reach acute stages that might be provocative of strikes,' *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 242, 70 S. Ct. 577, 579, 94 L. Ed. 795. Nor does that decision accord full recognition to the broad definition of the term 'carrier' in the Railway Labor Act. That decision is also contrary to the views of District Judge Kennerly in *National Council of Railway Patrolmen's Union v. Sealey*, 56 F. Supp. 720, 722-723, affirmed by this Court in 5 Cir., 152 F. 2d 500, see page 502, and is incompatible with decisions of the United States Supreme Court and of other Federal Courts. We hold, therefore, that the Railway Labor Act applies to Public Belt." (*New Orleans Public Belt R. Com'n. v. Ward*, 195 F. 2d 829, 831.)

We believe that the Congress did not intend to excuse from compliance with the Railway Labor Act those many railroads of this country that happen to be owned, or owned and operated, by states or their political subdivi-

sions but which are an integral and vital part of the general steam-railroad interstate system of transportation.

One of the best statements of the significance of the Railway Labor Act to the operation of the general steam-railroad interstate system of transportation is given in the dissent by Mr. Justice Frankfurter in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 751-752. To quote from Mr. Justice Frankfurter:

"From the point of view of industrial relations our railroads are largely a thing apart. The nature and history of the industry, the experience with unionization of the roads, the concentration of authority on both sides of the industry in negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations, the intricate technical aspects of these agreements and the specialized knowledge for which their interpretation and application call, the practical interdependence of seemingly separate collective agreements—these and similar considerations admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies.

The Railway Labor Act of 1934 is primarily an instrument of government. As such, the view that is held of the particular world for which the Act was designed will largely guide the direction of judicial interpretation of the Act. The railroad world for which the Railway Labor Act was designed has thus been summarized by one of the most discerning students of railroad labor relations: 'The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. . . . This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been

firmly established.' Garrison, *The Railroad Adjustment Board: A Unique Administrative Agency* (1937), 46 Yale L. J. 567-569.

The Railway Labor Act of 1934 is an expression of that 'reign of law' and provides the means for maintaining it. Nearly half a century of experimental legislation lies behind the Act. It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies."

Mr. Justice Frankfurter does not mention the ownership of railroads by states. But his description of the Railway Labor Act of 1934 as "an instrument of government" justifies the conclusion that the State Belt, which happens to be owned by California, can no more be excised from the general interstate system of railroad transportation than can the Southern Pacific Railway, which also happens to operate in the State of California.

II.

The Requirement of the Railway Labor Act That Rates of Pay, Rules and Working Conditions of Railway Employees Be Established by Collective Bargaining Excludes Their Dictation by California Legislative and Administrative Action.

The earlier litigation in the California courts developed because the State of California wishes a free hand in dictating the terms and conditions of employment of the persons who operate the State Belt Railroad. The existing law of California illustrates the character of control that the State intends to exercise over the rates of pay, rules and working conditions of the State Belt Railroad

employees. These California civil service laws conflict in numerous respects with the terms of the September 1, 1942 collective bargaining agreement (p. 84, Appendices, Petition for Certiorari). For example, contrary to the universal rule in effect on the railroads of the country, where seniority is of the utmost importance to the right to fill vacancies and to the right of promotion, the California law gives seniority only incidental effect. Thus Article 24, Section 1 of the California Constitution provides:

“§ 1. *Permanent appointments; promotions.*

“Section 1. Permanent appointments and promotion in the state civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination” (p. 74, Appendices, Petition for Certiorari).

California Government Code, Section 18951 provides: .

“§ 18951. *Advancement according to merit and ability.*

The board and each State agency and employee shall encourage economy and efficiency in and devotion to State service by encouraging promotional advancement of employees showing willingness and ability to perform efficiently services assigned them, and every person in State service shall be permitted to advance according to merit and ability.”

Article 13 of the agreement of September 1, 1942 provides, on the contrary, that promotion will be governed by *seniority* and ability (R. 107).

The California civil service laws vest in the State Personnel Board a large measure of control over wages and working conditions of the State Belt Railroad employees. California Government Code, Section 18850 provides:

“*Establishment and adjustment of salary ranges: Basis: Factors to be considered: Adjustments not to require expenditures in excess of appropriations:*

Retroactive changes. The board shall establish and adjust salary ranges for each class of position in the State civil service. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. The board shall make no adjustments which require expenditures in excess of existing appropriations which may be used for salary increase purposes. The board may make a change in salary range retroactive to the date of application for such change" (p. 78, Appendices, Petition for Certiorari).

In contrast with this law, Article 1 of the agreement of September 1, 1942 sets up specific hourly rates of pay without reference to the State Personnel Board (R. 100).

California Government Code, Section 19533, provides for layoffs in accordance with efficiency and seniority, while Article 14 of the agreement of September 1, 1942 requires layoffs in reverse order of seniority (R. 108-109).

It is evident from this and other legislation that the State of California proposes, either through statutes or by regulations issued by the Personnel Board, to dictate in an *ex parte* manner such aspects of the employment relationship as may appeal to it, and such dictation knows no limit in the detail to which it may extend. The attitude of the State is that when the legislature has enacted a law that prescribes some phase of the employer-employee relationship, there remains no leeway for the collective bargaining process on this subject. As the State of California said in the present litigation in its Complaint in Intervention (R. 27):

"* * * the rights of employment and to compensation and conditions of work are all matters which are established by the laws of the State of California, particularly the civil service laws of Intervenor and

that no rights with respect to any of the matters referred to in the complaint were acquired by plaintiffs under the said collective bargaining agreement. * * *

A further significant limitation which the State of California would impose on the collective bargaining process is its statutory scheme of vesting in the State Department of Finance supervisory authority over the contracts made by the Board of State Harbor Commissioners (p. 34, Appendices, Petition for Certiorari).

The responsibility for operating the State Belt Railroad is vested by law in a Board of State Harbor Commissioners consisting of three members. According to Section 3150 of the Harbor and Navigation Code, the Board of State Harbor Commissioners is authorized to "locate, construct, maintain, operate and extend" the State Belt Railroad. Under this grant of authority the Harbor Board may bargain collectively with representatives of the State Belt Railroad employees. But the Harbor Board has no authority to bargain *to a conclusion* on any subject.

California Government Code, Section 13070, gives to the Department of Finance a general supervisory authority to approve or to veto rates of pay or any other subject agreed upon in collective bargaining between the Board of State Harbor Commissioners and the representatives of State Belt Railroad employees (p. 35, Appendices, Petition for Certiorari). Code Section 13370 prescribes the manner in which copies of contracts and all supporting data shall be transmitted to the Department of Finance for detached consideration and ultimate approval or veto.

The importance ascribed by the Supreme Court of California to the action by the Department of Finance is declared in *State v. Brotherhood of Railroad Trainmen*, 232 P. 2d 857, at pages 863-864 as follows:

"* * * Moreover, even if we were to accept the argument that the requirement of approval of salaries

by the Department of Finance is tantamount to transferring to the department the power to 'fix' compensation of Harbor Board employees, the legislative intent to create *supervisory* powers in the department is so clear and unmistakable that section 18004 must be regarded as modifying all earlier legislation authorizing specific state agencies to fix the salaries of their employees." (Italics ours.)

Is the exercise of this supervisory or veto power over the collective agreements negotiated by the Harbor Board with the employees' representatives consistent with the federal duty imposed upon railway management by the Railway Labor Act to establish rates of pay, rules and working conditions by the process of collective bargaining? Is there an inconsistency between the obligation to establish rates of pay, rules and working conditions by the process of collective bargaining and the proposal by the State of California that it be permitted to establish the terms and conditions of employment by legislative action?

The answer to these questions depends upon what constitutes *collective bargaining* within the meaning of the federal law.

The obligation imposed upon carriers and the representatives of their employees to bargain collectively for the purpose of establishing rates of pay, rules, and working conditions, and the importance attached by the Congress to the maintenance of such agreements and their enforcement, is set forth in the following provisions of the Railway Labor Act (45 U. S. C. sec. 152, First, and Seventh, and sec. 156):

Sec. 2, First. "It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions,

Sec. 2, Seventh. "No carrier, its officers, or agents shall change the rates of pay, rules, or working condi-

tions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Sec. 6. "Carriers and representatives of the employees shall give at least thirty days written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conferences between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. * * *

This Court commented upon the essentials of collective bargaining as embraced by the Railway Labor Act in the course of its decision in the case of *Order of R. Telegraphers v. Railway Exp. Agency*; 321 U. S. 342, in which case it overruled a contention advanced by the carrier to the effect that the duty to bargain collectively for the purpose of establishing rates of pay, rules, and working conditions did not prevent the carrier from making individual agreements with its employees on the same subjects. Of this duty to bargain collectively for the purpose stated, this Court had the following to say (321 U. S. 346-347):

"Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States. From the first the position of labor with reference to the wage structure of an industry has been much like that of the carriers about rate structures. It is insisted that exceptional situations ~~often~~ have an importance to the whole because they introduce competitions and discriminations that are upsetting to the entire structure. Hence effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions. * * *

This Court observed in *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U. S. 1, at 44, that the duty to bargain collectively imposed upon employers by the National Labor Relations Act has its analogue in the Railway Labor Act.

The original National Labor Relations Act declared the policy of the United States regarding the duty of employers to bargain with the representatives of its employees, in the following language:

“It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, *for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.*” (29 U. S. C. sec. 151) (Italics ours).

Section 8 of the original Act was amended by the Labor Management Relations Act of 1947, by the inclusion of a definition of what constitutes collective bargaining, as follows:

“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *” (29 U. S. C. sec. 158(d)).

The theory behind the Federal policy of compelling em-

employers and employees to hammer out the terms and conditions governing their employer-employee relationship by the process of collective bargaining was succinctly stated by this Court in *National L. R. Bd. v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 45, in the following manner:

“ * * * The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. * * * ”

An oft-quoted statement by the Court of Appeals for the Fifth Circuit, made in *Globe Cotton Mills v. National Labor Relations Board*, 103 F. 2d 91, describes the federally imposed collective bargaining process and its anticipated accomplishment in the following manner (103 F. 2d 94):

“ * * * the Act does not compel agreements between employers and employees, but commands free opportunity for negotiation as likely to bring about adjustments and agreements which will promote industrial peace. The only compulsion to agreement is the possibility of strike by dissatisfied employees on the one side, or inability to continue business and afford any employment at all on the other. *We believe there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and as a guide for the adjustment of grievances.* * * * ” (Italics ours.)

Perhaps the latest authoritative declaration on this subject was made by this Court in the case of *N. L. R. B. v. American Nat. Ins. Co.*, 343 U. S. 395, at 401-405, as follows:

“ * * * The National Labor Relations Act is de-

signed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.

"Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences. Before the enactment of the National Labor Relations Act, it was held that the duty of an employer to bargain collectively required the employer 'to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement.' The duty to bargain collectively implicit in the Wagner Act as introduced in Congress, was made express by the insertion of the fifth employer unfair labor practice accompanied by an explanation of the purpose and meaning of the phrase 'bargain collectively in a good faith effort to reach an agreement.' This understanding of the duty to bargain collectively has been accepted and applied throughout the administration of the Wagner Act by the National Labor Relations Board and the Courts of Appeal.

"In 1947, the fear was expressed in Congress that the Board 'had gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make.' Accordingly, the Hartley Bill, passed by the House, eliminated the good faith test and expressly provided that the duty to bargain collectively did not

require submission of counter-proposals. As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8(d) of the National Labor Relations Act * * * (Italics ours.)

The essential element in "collective bargaining" required of employers and of employees' representatives by the Railway Labor Act and the National Labor Relations Act is what the term itself implies, to-wit, the give and take of traditional Yankee bargaining. Conduct and methods that have a tendency to defeat this bargaining process are inferentially forbidden by the law.

An employer, the Aluminum Ore Company, freely engaged in collective bargaining for the purpose of establishing wages and working conditions, but just before concluding the bargaining sessions the Company announced that it would continue its established practice of fixing wages and wage increases by *ex parte* decision. This action was condemned by the Court of Appeals for the Fourth Circuit in the case of *Aluminum Ore Co. v. National Labor Relations Board*, 131 F. 2d 485. The court's reasoning in condemning *ex parte* wage adjustments on the grounds that they are in conflict with the duty to establish wages by collective bargaining, was explained as follows (131 F. 2d 487):

"But, to our minds, this was not the collective bargaining required by the act. It was not the giving and taking in open discussion and negotiation contemplated by Congress. Rather it was reversion to the procedure of the past upon the part of the employer effectuating removal of bargaining concerning the exact subject matter at issue. By the employer's act, the union was thereafter excluded from bargaining in determining what the increases should be. Thereafter, it was to have no voice in such decision, for determination of all increases was reserved to the exclusive jurisdiction of petitioner subject only to a pro-

vision for the hearing of future individual grievances. Though the past relationship may have been satisfactory; though the system had been in force for some 40 years with resultant peaceful and friendly relationship between employer and employees, petitioner was confronted with requirements of the National Labor Relations Act, 29 U. S. C. A. § 151 *et seq.*, to desist from such method of procedure and to inaugurate, in lieu of it, round table bargaining upon the subject of wage increases. *This contemplates exchange of information, ideas and theories in open discussion and an honest attempt to arrive at an agreement.* The method adopted by petitioner ignored this standard of conduct and amounted in its essence to a statement that 'we shall determine the increases and they will stand as what we are willing to do subject only to the right of individuals to present grievances.' We think the evidence justifies the finding of the Board that the employment of unilateral procedure, under the circumstances presented, was not within the spirit or contemplation of the act." (Italics ours.)

One conclusion to be drawn from the foregoing authorities is perfectly obvious. That conclusion is that rates of pay, rules and working conditions are not to be established by *ex parte* decisions arrived at on the part of the employer in the face of collective bargaining proposals advanced by the employees. Time was, before the establishment of the Federal policy announced in the Railway Labor Act and the National Labor Relations Act, when rates of pay, rules and working conditions were simply decreed by the employer. The employee either accepted them, or he did not work. Discontent with the conditions of employment established in this manner led to widespread labor strife. It was to avoid these conditions and the resultant interference with the production of goods and the flow of commerce that Congress adopted the Federal policy of balancing the economic power of the employer with a roughly equal economic power on the part of the

employees, by assuring to the latter the right to organize and to be heard through representatives, and by requiring that wages, rules of employment and working conditions be established by collective bargaining between management and the representatives of the employees.

The process of collective bargaining presents an opportunity to the employee and to the employer for each to persuade the other of the worth of his views. To obtain an increase of wages, the employees' representative must convince the employer that for one, or perhaps several, reasons the employees should receive a higher wage. On the other hand, particularly if the employees are closely organized, the employer may himself bear the burden of convincing the employees' representative that the business has reached the limit of its ability to pay wage increases. Similarly, the establishment of more favorable rules of employment and improved working conditions depends upon the employees' representatives having the opportunity and the ability to convince management of the need to make such changes.

To be successful, collective bargaining—this process of the employer and the employee each attempting to sell the other his ideas on what should be the terms and conditions of employment—must have on each side of the bargaining table persons whose minds are open to conviction and, being convinced, are able to make decisions.

One can hardly imagine conditions less favorable to the success of this process than the conditions that the State of California now maintains, that it has the right to impose upon the employer-employee relationship obtaining between the State and the employees who operate the State Belt Railroad.

We believe it to be perfectly obvious that if the operation of the State Belt Railroad is subject to the Railway

Labor Act, then the Federal policy of requiring employers to bargain collectively with the representatives of their employees as a means of establishing rates of pay, rules and working conditions excludes California's proposals. The laying down of rules and working conditions through the enactment of laws by the California State legislature comes close to being the very antithesis of establishing rules and working conditions by employers and employees facing each other across the bargaining table. The same must be said of the California method of having the members of the State Harbor Commission engage in collective bargaining with the representatives of the railroad employees and then subject the agreements resulting from this bargaining to the veto power of an independent and unrelated department of the state, such as the Department of Finance. *Lacking is that all-important requirement of collective bargaining, namely, that the mind that makes the decisions must participate in the give-and-take of argument and counter-argument, from which process are born the compromises that constitute the product of collective agreements.*

If the authority of the Federal Government to regulate interstate commerce is to be supreme under the Constitution, then the authority of a state to prescribe the terms and conditions under which its employees shall operate a railroad engaged in interstate commerce must yield to what is now the Federal policy of requiring that these terms and conditions of employment be established through the process of collective bargaining.

This Court has already held that state law may not interfere with the collective bargaining duties imposed by the National Labor Relations Act upon employers and employees. For example, in *Hill v. Florida*, 325 U. S. 538, the State enjoined a labor union from functioning until it had complied with certain statutory requirements. The

injunction was invalidated on the ground that the Wagner Act included a "federally established right to collective bargaining" with which the injunction conflicted. As the Court said at page 542:

"* * * The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation. We hold that § 4 of the Florida Act is repugnant to the National Labor Relations Act."

In *Rabouin v. National Labor Relations Board*, 195 F. 2d 906, an unsigned collective bargaining agreement which was not to be performed by the employer within one year was held to be binding on the employer under the National Labor Relations Act, notwithstanding the provisions of the New York Statute of Frauds voiding all such agreements. As the Court said at page 910:

"But petitioner also alleges the invalidity of the 1946 contract as to him on the ground that the New York Statute of Frauds, N. Y. Personal Property Law, McK. Consol. Laws, c. 41, § 31, voids all agreements not to be performed within one year which are not signed by the party to be charged. The contention can have no weight; *the vagaries of state rules of law may not override provisions of a federal act geared to the effectuation of an important national labor policy. Hill v. State of Florida, ex rel., Watson, Atty. Gen., 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782; N. L. R. B. v. Hearst Publications, 322 U. S. 111, 123, 64 S. Ct. 851, 88 L. Ed. 1170.* A state statute of frauds, no matter what its wording, cannot transform into an unfair labor practice activity under the Act otherwise validated by a binding oral contract between employer and union. * * * (Italics ours.)

The agreement of September 1, 1942 is a valid agreement under Federal law. To the extent that its provisions established rates of pay, rules and working conditions inconsistent with the statutes of the State of California, the latter must yield.

III.

The Sovereign Power Reserved to the States Is Subordinate to the Power Vested in the Federal Government to Regulate the Subjects Enumerated in Article 1, Section 8, of the Constitution.

California argues that the application of the Railway Labor Act to it, as a State, raises serious questions of Constitutional power. It contends that a fundamental attribute of state sovereignty is the state's right to establish the terms upon which its employees will carry out state functions and that the incidental importance of collective bargaining by state employees of a railroad engaged in interstate commerce cannot justify federal interference (Petitioner's Brief, pp. 51-61).

California overlooks three points:

1. Section 8, Clause 3, of Article 1 of the Constitution of the United States grants to the Congress the power to regulate commerce among the several states.

2. Article 6 of the Constitution provides that the Constitution, and the laws of the United States which are made in pursuance thereof, shall be the supreme law of the land.

3. A state which chooses to engage in what are normally private enterprises, as contrasted with its traditional governmental functions, is subject to regulation by the Federal Government.

Numerous decisions of this Court have considered this problem. In *South Carolina v. United States*, 199 U. S. 437, the Constitutional provision involved was the power of Congress to impose license taxes for revenue purposes. To quote:

"The important question in this case is, whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that

they have no interest in the profits of the business and are simply the agents of a State which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors." * * * (p. 447).

"We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty." (p. 448).

"Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it." (p. 457).

"Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet when-

ever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.

For these reasons we think that the license taxes charged by the Federal Government upon persons selling liquor is not invalidated by the fact that they are the agents of the State which has itself engaged in that business * * * (p. 463).

In *University of Illinois v. United States*, 289 U. S. 48, the Constitutional provision involved was that which gives to Congress the power to regulate commerce with foreign nations. To quote from the opinion:

"The University of Illinois imported scientific apparatus for use in one of its educational departments. Customs duties were exacted at the rates prescribed by the Tariff Act of [September 21,] 1922, chap. 356, 42 Stat. at L. 858, U. S. C. title 19, § 121. The University paid under protest, insisting that as an instrumentality of the State of Illinois, and discharging a governmental function, it was entitled to import the articles duty free." * * * (page 56).

"The Tariff Act of 1922 is entitled—'An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes.' The Congress thus asserted that it was exercising its constitutional authority 'to regulate commerce with foreign nations.' The words of the Constitution 'comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.' *Gibbons v. Ogden*, 9 Wheat. 1, 193, 6 L. ed. 23, 69. It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action" * * * (pages 56-57).

"Protecting the functions of government in its proper province, the implication ceases when the

boundary of that province is reached. The fact that the State in the performance of state functions may use imported articles does not mean that the importation is a function of the state government independent of federal power. The control of importation does not rest with the State but with the Congress. In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the Federal power has been exerted: To permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. It is for the Congress to decide to what extent, if at all, the States and their instrumentalities shall be relieved of the payment of duties on imported articles" (pages 58-59).

In *Ohio v. Helvering*, 292 U. S. 360, the question again was the collection of federal taxes imposed upon liquor dealers in a State which had assumed a monopoly of the business of distributing and selling spirituous liquors. At page 369 of its opinion this Court said:

"If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." * * *

Several cases have arisen regarding the immunity from federal income tax of employees of transportation facilities owned by state governments. In *Helvering v. Powers*, 293 U. S. 214, the question presented was whether the compensation paid to members of the Board of Trustees of the Boston Elevated Railway Company was constitutionally exempt from the federal income tax. Immunity was sought on the ground that the trustees were officers of the Commonwealth of Massachusetts and instrumentalities of its government (page 220). At page 225 this Court said:

"The principle of immunity thus has inherent limitations." * * *

"And one of these limitations is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity." * * *

Again, in *Helvering v. Gerhardt*, 304 U. S. 405, this Court held that employees of the Board of New York Authority, a corporation created as an agency of the States of New York and New Jersey to construct and operate transportation and terminal facilities, are not employees of a state or a political subdivision thereof within a Treasury regulation exempting from federal income tax the compensation of state officers or employees for services rendered in connection with the exercise of an essential government function of the state.

In *Allen v. Regents of University System of Ga.*, 304 U. S. 439, the respondent was an instrumentality of the State of Georgia having control and management of the

University of Georgia and the Georgia School of Technology. The respondent sought an injunction against the collection of the federal admissions tax in respect of athletic contests participated in by teams representing these colleges. In denying the injunction this Court said:

"Third. We come then to the merits. For present purposes we assume the truth of the following propositions put forward by the respondent: That it is a public instrumentality of the State government carrying out a part of the State's program of public education; that public education is a governmental function; that the holding of athletic contests is an integral part of the program of public education conducted by Georgia; that the means by which the State carries out that program are for determination by the State authorities and their determination is not subject to review by any branch of the Federal Government; that a state activity does not cease to be governmental because it produces some income; that the tax is imposed directly on the State activity and directly burdens that activity; that the burden of collecting the tax is placed immediately on a State agency. The petitioner stoutly combats many of these propositions. We have no occasion to pass upon their validity since, even if all are accepted, we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States * * * (pp. 449-450).

"In final analysis the question we must decide is whether, by electing to support a governmental activity through the conduct of a business comparable in all essentials to those usually conducted by private owners, a state may withdraw the business from the field of Federal taxation." (p. 451.)

"Moreover the immunity implied from the dual sovereignty recognized by the Constitution does not extend to business enterprises conducted by the States for gain. As was said in *South Carolina v. United States*, *supra* (199 U. S. at p. 457, 50 L. ed. 268, 26 S.

Ct. 110, 4 Ann. Cas. 737): 'Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it * * *.' (pp. 452-453.)

In *California v. United States*, 320 U. S. 577, the subject involved was the power of the Federal Government to issue regulations governing the operation of waterfront terminals owned by the State of California and the City of Oakland. To quote from the opinion of this Court:

"The United States Maritime Commission found that terminals along the commercial waterfront in the Port of San Francisco were engaged in preferential and unreasonable practices in that they allowed excessive free time and made non-compensatory charges for their services, all in violation of §§ 16 and 17 of the Shipping Act of 1916, as amended. Accordingly, the Commission ordered the cessation of these proscribed practices * * *." (p. 578.)

"Two of the terminal operators in the San Francisco Bay area were the State of California and the City of Oakland. They brought these proceedings to set aside the Commission's order in so far as it applied to them * * *." (p. 579.)

"* * * The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers. California and Oakland furnished precisely the facilities subject to regulation under the Act, and with so large a portion of the nation's dock facilities, as Congress knew (53 Cong. Rec. 8276), owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies. We need not rest on in-

ference to avoid a construction that would have such dislocating consequences. The manager of the bill which became the Shipping Act of 1916, speaking on the floor of the House, left no doubt that the legislation was designed to prevent discrimination no less by public than by private owners. 53 Cong. Rec. 8276. And whatever may be the limitation implied by the phrase 'in connection with a common carrier by water' which modifies the grant of jurisdiction over those furnishing 'wharfage, dock, warehouse, or other terminal facilities,' there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission. Finally, it is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies. *United States v. California*, 297 U. S. 175, 184, 185, 80 L. ed. 567, 572, 573, 56 S. Ct. 521." (pp. 585-586.)

In *Case v. Rowles*, 327 U. S. 92, the State Commissioner of Public Lands of the State of Washington held a public auction for the sale of timber on school lands. One of the respondents bid an amount in excess of the ceiling price fixed by Maximum Price Regulation No. 460 of the Federal Price Administrator. The Federal Price Administrator commenced an action in the Federal District Court to enjoin the State Commissioner of Public Lands and the respondent from completing the timber transaction at a price above the ceiling fixed by the Regulation. The District Court held that the federal Emergency Price Control Act did not grant the Price Administrator authority to set maximum prices for school land sold by the State (pp. 95-96). In its opinion this Court held:

"We now turn to petitioner's Constitutional conten-

tion. Though as we have pointed out petitioners have alleged that the Act applied to setting a maximum price for school-land timber violates the Fifth and Tenth Amendments, the argument here seems to spring from implications of the Tenth Amendment only. The contention rests on the premise that there is a 'doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other * * *.' (p. 101.)

"But it is argued that the Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.' Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, the petitioner's argument is that the extent of that power as applied to state functions depends on whether these are 'essential' to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved. Cf. *United States v. California*, *supra* (297 U. S. at 183-185, 80 L. ed. 572, 573, 56 S. Ct. 421).

The State of Washington does have power to own and control the school-lands here involved and to sell the lands or the timber growing on them, subject to the limitations set out in the Enabling Act. And our only question is whether the State's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for state sales or to control rents charged by a state might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the federal government's establishment.

To construe the Constitution as preventing this would be to read it as a self-defeating charter. It has never been so interpreted. Since the decision in *M'Culloch v. Maryland*, 4 Wheat (U. S.) 316, 420, 4 L. ed. 579, 605, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said, that the Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the National Government.'

Where as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article VI provides that 'The Constitution and the Laws of the United States * * * made in pursuance thereof * * * shall be the supreme Law of the Land * * *.' (pp. 101, 102, 103.)

Finally, the very State Belt Railroad involved in the present litigation has been determined by this Court to be subject to regulation by the Congress under interstate commerce powers. As this Court declared in *United States v. California*, 297 U. S. 175:

"2. The state urges that it is not subject to the federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, see *Sherman v. United States*, 282 U. S. 25, 75 L. ed. 143, 51 S. Ct. 41, *supra*; *Denning v. State*, 123 Cal. 316, 55 P. 1000, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitu-

tionally be subjected to the provisions of the federal Act. In any case it is argued that the statute is not to be construed as applying to the state acting in that capacity.

Despite reliance upon the point both by the Government and the state, we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. See *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619, 624, 78 L. ed. 1025, 1029, 54 S. Ct. 542; *Green v. Frazier*, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; *Jones v. Portland*, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 112, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national Government when their regulation is appropriate to the regulation of interstate commerce. *United States v. Louisiana*, 290 U. S. 70, 74, 75, 78 L. ed. 181, 184, 185, 54 S. Ct. 28; *Railroad Commission v. Chicago B. & Q. R. Co.*, 257 U. S. 563, 66 L. ed. 371, 42 S. Ct. 232, 22 A. L. R. 1086; *Shreveport Rate Cases (Houston, E. & W. T. R. Co. v. United States)* 234 U. S. 342, 58 L. ed. 1341, 34 S. Ct. 833. A contract between a state and rail carrier fixing intrastate rates is subject to regulation and control by Congress, acting within the commerce clause, *New York v. United States*, 257 U. S. 591, 66 L. ed. 385, 42 S. Ct. 239, as are state agencies created to effect a public purpose, see *Sanitary Dist. v. United States*, 266 U. S. 405, 69 L. ed. 352, 45 S. Ct. 176; *University of Illinois v. United States*, 289 U. S. 48, 77 L. ed. 1025, 53 S. Ct. 509; see *Georgia v. Chattanooga*, 264 U. S. 472, 68 L. ed. 796, 44 S. Ct. 369. In each case the power of the state is

subordinate to the constitutional exercise of the granted federal power. (pp. 183-184.)

California, by engaging in interstate commerce by rail, has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. * * *." (p. 185.)

The decisions of this Court establish that the Federal Government has the necessary authority to impose collective bargaining on the State of California, just as the Federal Government has done on all other owners of railroads engaged in interstate commerce. The imposition of such collective bargaining is an incident of the Federal Government's authority under Section 8, Clause 3, of Article 1 of the Constitution of the United States to regulate commerce among the several states.

IV.

The Eleventh Amendment Is Not a Bar to the Application of the Railway Labor Act to a Common Carrier Engaged in Interstate Commerce When Owned by a State.

California argues that inasmuch as enforcement provisions of the Federal Railway Labor Act require use of federal judicial power at the instance of private parties,* the Congress could not have intended that the Act apply to common carriers engaged in interstate commerce and owned by a state, because the Eleventh Amendment would prevent an enforcement suit against the state (Petitioner's Brief, pp. 41-51).

* All of the positive requirements of the Railway Labor Act may, of course, be enforced by appropriate court proceedings, under general principles of law. However, in one instance, the Act itself spells out the detail of the legal action which may be brought: enforcement of an Award rendered by the National Railroad Adjustment Board (45 U. S. C. A. sec. 153 First (p)).

These respondents answer that the Eleventh Amendment would not prevent whatever enforcement suits might be required.

The Eleventh Amendment of the Constitution of the United States is as follows:

“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

In its practical operation this Amendment has been the subject of frequent interpretation by this Court. For example, it will be observed at once that the Amendment forbids suit against a state by citizens of another state. However, this Court has held that the effect of the Amendment is to prohibit suits in Federal Courts against one of the United States by its own citizens (*Hans v. Louisiana*, 134 U. S. 1; *Fitts v. McGhee*, 172 U. S. 516).

Again, Courts have interpreted the Amendment as not prohibiting a suit against a state, if that state gave its consent to such suit by its laws (*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 392), or by its actions (*Standard Oil Co. v. United States*, 25 F. (2d) 480, 484; *Clark v. Barnard*, 108 U. S. 436, 447).

Again, Courts have held that the Eleventh Amendment does not forbid a suit against a state officer or agency which has tortiously inflicted injury on a person, or who has wrongfully failed to comply with a positive requirement of law (*M'Callum v. United States*, 298 F. 373; *Hopkins v. Clemson College*, 221 U. S. 636; *People v. Superior Court*, 29 Cal. 2d 754, 178 P. 2d 1); nor does it prevent a suit to restrain unconstitutional action threatened against an individual by a state officer or agency (*Georgia R. & Bkg. Co. v. Redwine*, 342 U. S. 299).

Finally, this Court has held that the prohibition of the Eleventh Amendment does not extend to a suit against a corporation whose stock is owned by a state. *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheaton 904. As this Court said at page 907:

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

See also *Bank of Kentucky v. Wister*, 2 Peters 318.

California's argument that the Congress could not have intended to make state-owned railroads subject to the Railway Labor Act because of the prohibitions of the Eleventh Amendment disregards the second paragraph of Article 6 of the Constitution which establishes the supremacy of Federal law when regulating subjects over which the Congress is given authority by Article 1, Section 8. These provisions are as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (second par. of Art. 6).

"The Congress shall have Power . . . to regulate Commerce . . . among the several States . . ." (Art. 1 Sec. 8).

The supremacy of the powers of the Federal government when their exercise conflicts with the interests of a state has been firmly established by decisions of this Court. Illustrations of such cases have been discussed

at length in part III of the Argument of this Brief and need not be repeated here.*

The Eleventh Amendment was passed in consequence of the decision of this Court in *Chisholm v. Georgia*, 2 Dall. 419, in which it was held that a state could be sued by a citizen of another state in assumpsit. The Amendment was declared by the President to have been ratified January 8, 1798.**

Although the Eleventh Amendment appears to have been prompted by a high regard for the sovereignty and dignity of the states, the trend of current philosophy is against "legal irresponsibility"*** on the part of the states and of the Federal Government. This trend was apparent in *Sloan Shipyards Corp. v. United States S. Bd. E. F. Corp.*, 258 U. S. 549, in which this Court held that the United States Shipping Board Emergency Fleet Corporation, which was incorporated pursuant to Congressional authorization under the general laws of the District of Columbia, was not so far put in place of the United States (which owned all of the capital stock) as to share the immunity of the United States from suit.

The trend was specifically acknowledged in *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, when this Court, speaking through Mr. Justice Frankfurter, declared at pages 390-391:

"Because of the advantages enjoyed by the corporate device compared with conventional executive agencies; the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for

* See pages 31-42 of this Brief.

** A discussion of the historical background of the adoption of the Amendment is contained in *Monaco v. Mississippi*, 292 U. S. 313.

*** *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 388.

governmental ends. In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope."

The State of California has been in the vanguard of the current trend toward putting aside the cloak of sovereign immunity from suit. Since 1893 this State has, through successive legislative enactments, authorized suits against the State by persons having claims sounding either in contract or in tort. The history of California's retreat from the doctrine of "legal irresponsibility" is reviewed in the decision by the Supreme Court of California in the case of *People v. Superior Court*, 29 Cal. 2d 754, 178 P. 2d 1.

The basic question proposed by California's contention that the Eleventh Amendment bars the application of the Railway Labor Act to a common carrier engaged in interstate commerce, when it is owned by a state, is this:

If Congress, when regulating a subject over which it has been given supreme authority by Article 1, Section 8 of the Constitution, deems it necessary or desirable as an incident of such regulation to authorize suits by employees against states operating interstate railroads, is such exercise of Federal power subordinate to the protection against suit afforded the states by the Eleventh Amendment; or is the protection afforded the states by the Eleventh Amendment subordinate to the authority vested in the Federal Government by Article 1, Section 8?

The cases already cited and discussed by these respond-

ents in part III of their Argument in this Brief establish that the regulatory power of the Federal Government arising from the Constitutional grant of authority contained in Article 1, Section 8, takes precedence over the sovereign powers of the states.

However, the precise problem posed here is without precedent in the decisions of this Court, so far as we have been able to discover.

The Circuit Court of Appeals for the Fifth Circuit answered this question in *Illinois Cent. R. Co. v. Mississippi Railroad Commission*, 138 F. 327. In this case the Mississippi Railroad Commission, an agency of the State of Mississippi, issued orders concerning the operation of the trains of the Illinois Central Railroad Company. The railroad filed suit against the Commission to enjoin the enforcement of certain of those orders. The Court said at page 331:

"We are met at the threshold of the case with the proposition that this suit is forbidden by the eleventh amendment; that it is, in effect, a suit against a state by a citizen of another state. The Constitution, with its amendments, is construed as one instrument, and the eleventh amendment cannot be applied to nullify the power conferred on Congress to regulate commerce among the several states. It is not a barrier to judicial investigation to ascertain whether other provisions of the Constitution have been disregarded by state action. *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761."

On appeal, this Court affirmed the judgment (*Miss. R. R. Com. v. Illinois Cent. R. R.*, 203 U. S. 335), but apparently on the ground that the suit was not against the State of Mississippi. As this Court said at page 340:

"The first objection raised by the appellant is.

that this suit is, in substance, one against a State. The commission was created by the State of Mississippi, under the authority of its constitution and laws, for the purpose of supervising, and to some extent controlling, the acts of the railroads operating within the State. Such a commission is subject to a suit by a citizen. *Reagan v. Trust Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466; *Prout v. Starr*, 188 U. S. 537. We do not see that *Arbuckle v. Blackburn*, 191 U. S. 405, is at all in point."

It is believed that this Court, at least by way of dictum, had stated the principle adhered to by the Court of Appeals for the Fifth Circuit in *Illinois Cent. R. Co. v. Mississippi Railroad Commission*, 138 F. 327, *supra*. Such statement appears to have been given in *Prout v. Starr*, 188 U. S. 537, in which this Court held that in an action properly instituted against a state official the Eleventh Amendment is not a barrier to a judicial inquiry as to whether the provisions of the Fourteenth Amendment have been disregarded by state enactments. This Court, at page 543, said:

"The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, . . ."

The answer to the above-posed italicized question as to the supremacy of the Federal Government seems clear, in view of the consequences that would follow if the authority granted the Federal Government by Article 1, Section 8, were held to be subordinate to the interdiction of the Eleventh Amendment. Numerous small railroads en-

gaged in interstate commerce are owned by states, or their municipalities.* Following is a list of the names of these railroads:

Savannah State Docks,
 Lewiston & Auburn Ry. Co.,
 Norway Branch R. R. Co.,
 Belfast & Moosehead Lake R. R. Co.,
 Plattsburgh & Dannemora R. R.,
 North Brookfield R. R. Co.,
 Mount Gilead Short Line Ry.,
 Holyoke & Westfield R. R. Co.,
 The Atlantic & North Carolina R. R. Co.,
 Western & Atlantic R. R.,
 Lakeland Railway,
 The North Carolina R. R. Co.,
 Cincinnati Southern Railway,
 Albany Port District Railroad,
 Board of Harbor Commissioners R. R.,
 Jay Street Connecting R. R.,
 The Philadelphia Belt Line R. R. Co.,
 Broward County Port Authority,
 Municipal Docks Railway,
 New Orleans Public Belt R. R.,
 Port Utilities Commission of Charleston, South
 Carolina,
 Terminal Ry. Alabama State Docks,
 Galveston Wharves, Board of Trustees of
 Harbor Belt Line R. R.,
 Municipal Terminal R. R.,
 State Belt R. R. of California,
 Stockton Port District,
 California & Oregon Coast R. R.,
 City of Prineville Railway,
 Texas State Railroad.

Particular attention is directed to the Cincinnati Southern Railway, which owns a railroad line from Cincinnati,

* I. C. C. Sixty-ninth Annual Report on the Statistics of Railways in the United States for the Year ended December 31, 1955
 • • • Prepared by the Bureau of Transport Economics and Statistics.

Ohio, extending south to Memphis, Tennessee, and which presently constitutes part of the great Southern Railway system. The elimination of this group of interstate carriers from the Congressional plan for regulating labor-management relations throughout the general system of interstate railroad transportation would not be in the interest of the public, the railroads, or their employees.

V.

Answer to Amicus Curiae Brief of California State Employees' Association in Support of Petitioner's Position.

The principal theme of the Brief *amicus curiae* filed by the California State Employees' Association in this case is that certain employees of the State Belt Railroad are members of the Association and it is adverse to the interests of these employees to be compelled to work subject to the rates of pay, rules and working conditions established by the collective agreement, dated September 1, 1942, negotiated by the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen with the Board of State Harbor Commissioners. The contention is made that the rights and benefits which the employees of the State Belt Railroad enjoy under this collective agreement are less favorable than would be their rights and benefits if the rates of pay, rules and working conditions were fully subject to the California state law and administrative regulations.

The merit of this lament on behalf of those persons employed by the State Belt Railroad who happen to be members of the California State Employees' Association can be fairly measured by the fact that the two Brotherhoods were freely chosen by the operating employees of the State Belt Railroad to be the craft representatives of these employees; that the continuance of these Brother-

hoods in the job of craft representative depends upon the will of the majority of the members of the crafts concerned; that the service rendered by the Brotherhoods as craft representatives may be terminated at any time; and that the services of the Association may be selected in lieu of the Brotherhoods whenever the majority of the employees are dissatisfied with the rates of pay and working conditions obtained for them through the efforts of these Brotherhoods. It is, we suggest, reasonable to suppose that if a majority of the operating employees of the State Belt Railroad preferred the rates of pay, rules governing seniority, and other aspects of the employment relationship which would become effective if the California law and administrative regulations were fully applied to their employment, the will of the majority would and could readily be made known to their agents. The craft representative chosen by a majority could readily substitute such rates of pay and employment rights, through negotiation with the Board of State Harbor Commissioners, in lieu of those prescribed by the collective agreement.

The fact that the majority of the operating employees of the State Belt Railroad chose the two Brotherhoods as their representatives, to negotiate a collective bargaining agreement on their behalf under the Railway Labor Act in preference to selecting the California State Employees' Association to accept the State Civil Service System, well illustrates the wisdom of the Congress in enacting the Railway Labor Act as the primary instrument of government for the making and maintenance of agreements concerning rates of pay, rules and working conditions and as the best means to avoid any interruption to interstate commerce growing out of any dispute between a carrier and its employees.

CONCLUSION.

These respondents respectfully suggest that this Court should hold that the ownership by a state of a railroad engaged in interstate commerce does not exempt the operation of such carrier from the requirement of complying with the Railway Labor Act; that the Federal policy, embodied in that Act, of requiring that rates of pay, rules and working conditions for railroad employees be established by means of collective bargaining between management and representatives of employees, precludes the state which owns the carrier from dictating by legislation or administrative action the rates of pay and conditions of employment of such employees; and that the authority vested in the Federal government by Article 1, Section 8, Clause 3, to regulate interstate commerce is complete and is not subject to the limiting condition imposed by the Eleventh Amendment.

Respectfully submitted,

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March 7, 1957.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 385

STATE OF CALIFORNIA, PETITIONER

v.

HARRY TAYLOR, PETER A. CALUS, JAMES W.
BREWSTER, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Court of Appeals (R. 84-97) is reported in 233 F. 2d 251. The memorandum opinion of the District Court (R. 57-66, 71-72) is reported in 132 F. Supp. 356. The supplemental memorandum of the District Court (R. 71-72) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1956 (R. 97). A timely petition for rehearing was denied on June 7, 1956 (R. 98). The petition for a writ of certiorari was filed on September 5, 1956, and was granted on December 10, 1956

(R. 98). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

(QUESTION PRESENTED

The question considered in this brief is whether the Railway Labor Act applies to the State Belt Railroad, a common carrier owned and operated by the State of California and engaged in interstate transportation.

STATUTE INVOLVED

The Railway Labor Act of May 20, 1926, 44 Stat. 577, as amended, 45 U. S. C. 151, *et seq.*, provides in part as follows:

SECTION 1. When used in this Act and section 225 of Title 28 and for the purposes of said Act and section—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, * * * and any receiver, trustee, or other individual or body judicial or otherwise, when in the possession of the business of any such "carrier": * * *

* * * *

SEC. 3. First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act [June 21, 1934], and it is hereby provided—

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements con-

cerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, * * *.

STATEMENT

The State Belt Railroad (Belt Railroad) parallels the San Francisco waterfront. It serves some 45 wharves and 175 industrial plants, and connects with freight car ferries, steamship docks, and three interstate railroads. It transports by its own engines all freight cars offered to it, many of which come from or are going to points outside the State (R. 53). Its

tariffs, which are filed with the Interstate Commerce Commission (R. 54), provide for a flat charge for moving cars between any two points on its line (R. 53).

The State of California owns the Belt Railroad, and the road is operated by the Board of State Harbor Commissioners for San Francisco Harbor (Board), composed of three commissioners appointed by the Governor (R. 52). The Board fixes the charges, and the revenues are deposited in the State Treasury and credited to the account of the San Francisco Harbor Improvement Fund (*ibid.*). Belt Railroad employees, who vary in number from 125 to 225, are appointed in accordance with the civil service laws of the State (R. 54).

On September 1, 1942, the Board entered into a collective bargaining agreement with the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen as the respective representatives of the Belt Railroad's locomotive engineers, firemen, and hostlers, and its yard engine foremen and helpers (R. 55). This agreement, which established rates of pay and working conditions for the railroad employees (R. 100-116), was observed by the parties until on or about November 13, 1951 (R. 45, 46). During this period, various disputes arising under the agreement were referred to the National Railroad Adjustment Board, which took jurisdiction upon the express basis that the Railway Labor Act applies to the Belt Railroad (R. 38, 42, 43-44, 55).

In 1948, the State of California instituted in the Superior Court of San Francisco County a declaratory judgment action against the two railroad brotherhoods

to determine the validity of the collective bargaining agreement of September 1, 1942. On appeal from a judgment for the defendants, the Supreme Court of California reversed, holding that the Railway Labor Act did not apply to the Belt Railroad and that the wages and working conditions of its employees were therefore governed by the State's Civil Service Act rather than by the 1942 collective bargaining agreement. *State v. Brotherhood of Railroad Trainmen*, 37 Cal. 2d 412, certiorari denied November 13, 1951, 342 U. S. 876.

Five employees of the Belt Railroad instituted the present action against the ten members of the National Railroad Adjustment Board, First Division, and its Executive Secretary (R. 5-6). The plaintiffs alleged that they had filed claims with the First Division pursuant to Section 3, First (i) of the Railway Labor Act, and that its five carrier members had refused, upon the ground that the Board was without jurisdiction, to consider or decide these claims (R. 7-9).¹ The prayer was for an injunction requiring action upon the claims (R. 10). The United States, answering on behalf of the First Division and its Executive Secretary, supported the complaint and prayer for relief (R. 12-13). The carrier members, answering through their own attorneys, opposed (R. 15-23), and the present petitioner, the State of California, intervened as a party defendant (R. 28-29). Both

¹ This refusal created an impasse because each division of the Adjustment Board is composed of an equal number of carrier representatives and employee representatives.

the United States and the State of California filed motions for summary judgment (R. 30, 31).

The District Court granted California's motion for summary judgment upon the ground that *State v. Brotherhood* had held that the 1942 collective bargaining agreement was invalid under California law irrespective of whether the Railway Labor Act applies to the Belt Railroad (R. 57-66). The Court of Appeals held that this Act does apply to the Belt Railroad (R. 89-91),² and remanded the cause to the District Court with directions to enter a decree granting the relief sought by the plaintiffs (R. 96-97).

This Court, in granting certiorari, invited the Solicitor General to file a brief as *amicus curiae* (R. 98).

ARGUMENT

THE RAILWAY LABOR ACT APPLIES TO THE BELT RAILROAD

Section 1, First, of the Railway Labor Act defines the carriers to which it applies as including "any * * * carrier by railroad, subject to the Interstate Commerce Act." The further words "and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier'" emphasize that the nature of the carrier operations is the sole determinative test of the application of the Act. Since the Interstate Commerce Act applies to all common carriers by railroad

²The further holding by the court that the collective bargaining agreement had been approved by the Department of Finance of the State and that it therefore met the requirements of California law in this respect (R. 92-96) is expressly excluded from the questions presented by the petition for certiorari (Pet. 9).

engaged in interstate transportation (49 U. S. C. 1 (1)) and since Belt Railroad is a common carrier engaged in interstate transportation, the Railway Labor Act, by its express terms, applies to the Belt Railroad. The Belt Railroad has filed its tariffs with the Interstate Commerce Commission (R. 54) and thus, by its own action, has recognized that it is subject to the Interstate Commerce Act. In addition, the Commission has so ruled. *California Canneries Co. v. Southern Pacific Co.*, 51 I. C. C. 500, 502-503; *United States v. Belt Line Railroad Co.*, 56 I. C. C. 121.

Petitioner's contention is, and must be, that although unambiguous words of the statute bring Belt Railroad under the Act, there nevertheless should be read into the Act an implied exception of any state-owned railroad. This Court dealt with and rejected a parallel contention in *United States v. California*, 297 U. S. 175, which held that the Belt Railroad is subject to the Safety Appliance Act.³ This Court there said that the statute was "all-embracing in scope and national in its purpose" and "as capable of being obstructed by state as by individual action"; and that its language and objectives were too plain to be thwarted by any general rule of construction, such as that the enacting sovereign presumptively is not bound by its own statute. 297 U. S. at 186.

Congress, when enacting statutes regulating railroads or their employees, has consistently legislated for the industry as a whole, without regard to the

³ The applicable sections of the Safety Appliance Act covered "any common carrier engaged in interstate commerce by railroad". 297 U. S., note 1, at 180.

identity of the owner or operator. We have already referred to the coverage of the Railway Labor Act and the Safety Appliance Act. The Employers' Liability Act also applies to "[e]very common carrier by railroad while engaging in [interstate] commerce." 45 U. S. C. 51. The Railroad Retirement Act and the Railroad Unemployment Insurance Act similarly apply to any carrier by railroad subject to Part I of the Interstate Commerce Act. 45 U. S. C. 228a, (a), (m); 45 U. S. C. 351 (a), (b). And with the exception of the decision by the Supreme Court of California in *State v. Brotherhood*, *supra*, these various statutes have been held to apply to railroads owned or operated by a state. Safety Appliance Act (*United States v. California*, *supra*); Railway Labor Act (*New Orleans Public Belt R. R. Commission v. Ward*, 195 F. 2d 829, 831 (C. A. 5)); Federal Employers' Liability Act (*Maurice v. State of California*, 43 Cal. App. 270); Carriers Taxing Act of 1937, a companion measure to the Railroad Retirement Act of 1937, now codified in 26 U. S. C. 3231 (*California v. Anglim*, 129 F. 2d 455 (C. A. 9), certiorari denied, 317 U. S. 669).^{*}

Petitioner, in contending that the Railway Labor Act should be construed as impliedly exempting any railroad owned and operated by a state, urges that such construction would accord with the action of Congress in expressly exempting employees of the

^{*} See, also, *California v. United States*, 320 U. S. 577, 585-586, holding that the Shipping Act of 1916, which covers "any person" furnishing wharfage or other terminal facilities in connection with a common carrier by water, applies to wharfage and terminal facilities owned and operated by a state or a municipality.

United States or of a state from certain federal statutes governing employer-employee relationships (Pet. Br. 32-35). The statutes cited—the Labor Management Relations Act, the War Labor Disputes Act of 1943, the Fair Labor Standards Act, and the reemployment provisions of the Universal Military Training and Service Act—cover broad fields of employment. We submit that the policy pursued in such legislation is hardly persuasive that Congress, which wrote no comparable exception into the Railway Labor Act, nonetheless intended one when it dealt with the employer-employee relationship in the railroad industry.

Railroading is, as to such relationship, a singular industry; it is a state within a state and has its own customs and vocabulary. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale Law Journal 567; 568-569. Congress not only has carved this industry out of the Labor Management Relations Act, but it has provided, by the Railway Labor Act, techniques peculiar to that industry. These include determination of grievances and disputes as to the interpretation of collective bargaining agreements by the National Railroad Adjustment Board (45 U. S. C. 153); invocation of the aid of the National Mediation Board in settling disputes concerning changes in wages and working conditions (45 U. S. C. 154-155); regulation of the making of arbitration agreements and court enforcement of executed agreements (45 U. S. C. 158-159); and Emergency Boards appointed by the President with a required

standstill in the conditions giving rise to the dispute until after such Board has reported (45 U. S. C. 160).

We submit that it is significant that the collective bargaining agreement which California made with the two brotherhoods (R. 100-116) deals almost exclusively with working conditions, or employees' rights or duties, incident to the special circumstances of railroad operation. Just as Congress in enacting the Safety Appliance Act had reason to protect railroad employees against unnecessary injury whether the railroad was owned by a state or private corporation, so it might reasonably conclude that railroad employees should have the right to negotiate with management with reference to wages and working conditions through union officers who are intimately acquainted with the problems, traditions, and conditions of the railroad industry, whether the railroad is operated privately or by a state agency. Congress might well have deemed this system more advantageous, both for the owning state and for its railroad employees, than application to these employees of a civil service system necessarily framed in relation to totally different types of work and employment. In any event, it was reasonable for Congress, recognizing that interconnecting railroads form an integrated national system and that the railroad brotherhoods are national in scope, to conclude that a uniform method of approaching and dealing with problems relating to wages and working conditions would minimize conflict and disharmony, would tend to eliminate inequities and would promote a desirable mobility within the railroad labor force. Congress

could pursue such an objective, we submit, on a comprehensive basis, that is to say, without excepting any railroad engaged in interstate transportation.

Petitioner appears to contend (Pet. Br. 36-38) that collective bargaining and collective bargaining agreements are repugnant to or inconsistent with accepted concepts of public employment. It is appropriate, initially, to view this contention in perspective. The Belt Railroad was operated for more than nine years—from September 1, 1942, to November 13, 1951—upon the basis that it was subject to the Railway Labor Act (*supra*, p. 4), and no showing has been made that such operation gave rise to legal or practical difficulties. Moreover, application of the Act to the Belt Railroad affects less than 3/10 of 1% of the State's employees.⁵ It is also to be noted that railroading is an activity in which states rarely engage and then, so far as appears, only in operating short-line belt, water-front railroads.

The Railway Labor Act neither permits nor forbids strikes, nor does it compel the making of a bargaining agreement. The provisions of the Act here pertinent merely give employees the right to organize and select representatives free from employer interference and to negotiate through their representatives with reference to terms and conditions of employment; impose on both employer and employees the duty to con-

⁵ The Belt Railroad has from 125 to 225 employees (R. 54), while the State of California has some 69,500 employees. We derive the latter figure from the statement made in the *amicus curiae* brief of California State Employees' Association (p. 3) that it has a membership of 59,142, and that its membership is approximately 85% of those eligible.

State employees before the Legislature, the State Personnel Board, the various departments, in the courts, administrative agencies and otherwise. Included in the above is continued representation for increased pay, better working hours and conditions, improved sick leave and vacation, liberalization of the State Employees' Retirement System, prevention of inroads into and breakdown of the State Civil Service System, individual representation on grievances. In brief, the Association does for the California State employees what the Railroad Brotherhoods do for their members who are in private employment.

Throughout the past 26 years, the Association has been the almost exclusive representative of California's employees. This has been recognized by management:

"Management and employees must meet problems together with sound judgment, fairness, and confidence to have an effective personnel program. The California State Employees' Association, representing a large majority of the State's working force, has played a significant role in the development of California's program. It was largely responsible for creation of the retirement system and for securing the addition of Article XXIV to the State Constitution. Although aggressive in the interests of its members, the Association has maintained a tradition of making its proposal conform to the long-range interests of good State Government. It has been a constructive force." (Twenty-first Biennial Report of the California State Personnel Board, page 20.)

Enlightened management, a progressive attitude on the part of the California Legislature and the State's executive officers, and the liberal political attitude of the people of the State have coupled with the efforts of

fer in attempted settlement of grievances; and permit reference of unsettled disputes to the National Railroad Adjustment Board, each division of which is composed of an equal number of carrier and employee members.

What is really at stake in this case, therefore, is whether Congress intended that collective bargaining, as fostered and protected by the Railway Labor Act, should apply to a railroad of the character of Belt Railroad. And, since the language of the statute plainly includes the railroad, the burden is on petitioner to show that Congress intended to exclude from the Act any railroad owned and operated by a state.

Collective bargaining with reference to public employment is no rarity. For example, both the Tennessee Valley Authority (see 16 U. S. C. 831 (b)) and Inland Waterways Corporation (see 49 U. S. C. 151) have contracted with employees as to wages and conditions of employment. Rhyne, *Labor Unions & Municipal Employe Law*, 141, 143, 437, 458. King, *The TVA Labor Relations Policy at Work*. The Government Printing Office (see 5 U. S. C. 664 (1946 ed.)) also sets wages after negotiating with its employees. Agger, *The Government and Its Employees*, 47 Yale Law Journal 1109, 1112. See, also, the analysis of 21 representative agreements covering employees of public bodies in Bureau of National Affairs, 18 Labor Relations Reference Manual 46.

Petitioner contends that application of the Railway Labor Act to a state-owned railroad raises a serious constitutional question, and that, to avoid constitu-

the Association to establish the finest civil service system in the world.

CONTENTIONS OF THE ASSOCIATION IN THIS CASE

The Association contends that the employment rights of the employees of the Railroad who are members of the Association and whom it represents in filing this brief amicus curiae are adversely affected by the existence, operation and application of the contract and its provisions and that the contract is illegal because:

1) Their rights, benefits and privileges as State employees are less under the provisions of the contract than under the State Civil Service Act;

2) The existence, operation and application of the contract has resulted in a lack of uniformity in granting employment rights, benefits and privileges as between the various State employees at the harbor and otherwise and therefore is discriminatory;

3) That the Civil Service employees are unwillingly and involuntarily brought under the provisions of the contract and will be unwillingly and involuntarily working under the provisions of the contract, that they at no time consented to the making of an illegal contract or one that discriminated against them;

4) That the lack of uniform treatment and status among the various State employees and the harbor employees because of the contract has adversely affected the working morale of State employees and if the contract is put back in force and effect it will continue to have an adverse affect upon the morale of harbor and other State employees.

tional doubts, the Act should be interpreted as not embracing such a railroad (Pet. Br. 51-55, 60-61). In our view, the short answer to these contentions is that *United States v. California*, 297 U. S. 175, puts at rest the constitutionality of the Railway Labor Act as applied to the Belt Railroad. On the issue of constitutionality, we see no valid distinction between application of the Railway Labor Act to the Belt Railroad and application of the Safety Appliance Act to that road. In *United States v. California*, this Court said that the State, although acting in its sovereign capacity in operating the Belt Railroad, necessarily so acted "in subordination to the power to regulate commerce, which has been granted specifically to the national government" (297 U. S. at 184), and that "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers" (297 U. S. at 185). In our view, the principle is no less applicable here.

CONCLUSION

We respectfully submit that the judgment of the Court of Appeals should be affirmed. If the Railway Labor Act is held to apply to Belt Railroad, we believe further that the cause should not be remanded for trial as to the validity of the collective bargaining agreement under the civil service laws of the State, as petitioner has suggested (Pet. Br. 71). This agreement concededly conforms to the provisions of the Railway Labor Act and that Act, if applicable, vali-

dates the agreement irrespective of the provisions of the civil service laws of California.

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MARCH 1957.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 385

STATE OF CALIFORNIA,

Petitioner,

vs.

HARRY TAYLOR, PETER A. CALUS,
JAMES W. BREWSTER, WILLIAM
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Respondents,

and

L. B. FEE, et al., etc. et al.,

Respondents.

AMICUS CURIAE BRIEF OF CALIFORNIA
STATE EMPLOYEES' ASSOCIATION IN
SUPPORT OF PETITIONER'S POSITION

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In the Supreme Court

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AMICUS CURIAE BRIEF OF CALIFORNIA
STATE EMPLOYEES' ASSOCIATION IN
SUPPORT OF PETITIONER'S POSITION

BRIEF AMICUS CURIAE

Now comes the California State Employees' Association, hereinafter called "Association," and files its brief amicus curiae in this matter, the written consent of all parties to the case having been filed concurrently with the filing of this brief.

tralize the handling and approval of these matters and break down the business-like handling of the State business as well as lowering of the morale of the State employees because of the discriminations that would arise as between employees in the various State departments.

CONCLUSION

Wherefore, it is respectfully submitted that this Honorable Court should determine and hold that the contract is null and void and of no effect, but that if it should hold that it is valid, that it should further determine and hold that it is null and void and of no effect in so far as any of its provisions conflict with the laws, rules and regulations of the State of California and of the Personnel Board of the State of California.

Respectfully submitted.

Dated:

PHILIP C. WILKINS,
Attorney for California State
Employees' Association

THE CALIFORNIA STATE EMPLOYEES' ASSOCIATION

The association is a voluntary association of all the employees of the State of California. There are approximately 132 chapters in the State of California. It was organized February 23, 1931 and the chapter representing the employees of the Board of State Harbor Commissioners, hereinafter referred to as "Board" is Chapter No. 1.

The objectives of the association are set forth in Article I of its constitution:

"The California State Employees' Association is hereby constituted and established in order to foster acquaintanceship, cooperation, efficiency and harmony among State employees and to develop a fuller knowledge among them of the State's organization, functions and activities;

"to encourage and preserve a true merit system in State government;

"to promote the welfare of State employees in all ways compatible with the public interest, including the support of legislation deemed beneficial and resistance to legislation deemed detrimental to their interests;

"to encourage the maintenance of high standards of employee-conduct in governmental affairs;

"to advocate and defend a just and efficacious administration of laws;

"to aid in the improvement of government and in the development of the State's resources and the advancement of the State's economy;

"to inspire and maintain in the hearts of its members a constant dedication to the principles of constitutional democracy as exemplified in our American form of government;

"and in all ways to render the most effective service to the people of the United States of America and of the State of California."

The chapter is the association's basic organizational unit. Its function is approximately equivalent to that of a "local" in a craft union. In size, chapters range from approximately 50 to over 7,000 members. The association's total membership was 59,142 on December 21, 1956. This is approximately 85% of those eligible. Membership is completely voluntary.

The association's activities are guided by a General Council which is composed of representatives elected by the members of each chapter on the basis of one delegate for each 100 members. The General Council meets annually and, by resolution, directs the scope of activities for the next year. A Board of Directors composed of the Association's officers and 19 regional directors is the interim policy body. It also directs the activities of Headquarters Office—the full-time paid staff of the Association.

The democratic process is an integral part of the operations of the association. Maximum responsiveness to the needs of California's employees is assured by the type of organization adopted.

It is by many times the largest organization of employees in the State of California, representing the

5) The contract is not valid because it was not and has not been approved by the Department of Finance of the State of California.

6) That the provisions of the contract which are in conflict with the provisions of the State Constitution and the State Civil Service Act are not binding upon the Harbor Board and the employees.

7) That the State Harbor Commissioners did not possess the power and authority to establish working conditions for the Civil Service employees of the Belt Railroad through a collective bargaining agreement with the Railroad Brotherhoods.

8) The status of the State employees working on the Railroad are to be governed by the State Civil Service laws and regulations of the State of California and not those of the contract.

THE CHARACTERISTICS OF THE CALIFORNIA CIVIL SERVICE SYSTEM

A constitutional provision (Const., Calif. Art. XXIV) providing the basis for a merit system for the employees of the State of California was adopted by vote of the people in November, 1934. In 1937, a State Civil Service Act was adopted. (Chap. 753 Statutes of 1937. Later codified in Calif. Govt. Code, Title 2, Division 5, Parts 1 and 2.) This act provides a comprehensive and flexible personnel system for employees of the State, including those on the Belt Railroad.

Since the establishment of constitutional civil service, a number of attempts have been made to weaken the system. Each attempted weakening has been re-

jected by the people. Legislative changes have been directed to improving the system by adoption of currently accepted personnel practices. Among the more important characteristics of the system are: (a) Appointment and promotion based on merit, efficiency and fitness as ascertained by competitive examination, (Const. Calif. Article XXIV, Sec. 1); (b) Salaries comparable to those generally prevailing. (Calif. Govt. Code 18850 et seq.) (c) A minimum of 15 working days of vacation each year (Calif. Govt. Code 18050 et seq.) (d) Unlimited accumulation of sick leave at the rate of 12 days a year (Calif. Govt. Code 18100, et seq.) (e) Dismissal only for cause and with the right of appeal (Calif. Govt. Code 19500, et seq.) (f) A systematic classification plan which provides the basis of an objective personnel system. (Calif. Govt. Code 18800, et seq.)

**THE STATE BELT RAILROAD IS ONLY ONE OF
SEVERAL FUNCTIONS OF THE OPERATION OF THE
PORT OF SAN FRANCISCO**

The Board of State Harbor Commissioners is responsible for the operation of the Port of San Francisco. Its functions include: Construction and operation of piers, and wharves, and dependent facilities; berthing of ships; maintenance of the channel; operation of the Foreign Trade Zone; policing of the waterfront; and operation of the State Belt Railroad.

Thus, the Railroad is but a supplementary, but necessary, part of the activity carried on. In total, the Board of State Harbor Commissioners employs ap—

proximately 495 persons, of whom 93 operate the Railroad.

**ALL EMPLOYEES OF THE HARBOR BOARD, INCLUDING THOSE
OF THE BELT RAILROAD ARE EMPLOYED UNDER THE CIVIL
SERVICE LAWS AND REGULATIONS OF THE
STATE OF CALIFORNIA**

Since 1951 the Harbor Board has operated solely under the State Civil Service laws and regulations and not under the contract. Prior to the decision of State of California vs. Brotherhood of Railroad Trainmen, 37 Cal. (2d) 412, 232 Pac. (2d) 857, the employees of the Harbor Board worked in the incongruous situation of having part of them working under conditions established by the contract and all others under laws, rules and regulations governed by the State Civil Service Act. Such a situation is certain to result in disharmony among the employees, a lowering of morale, and a possible loss of efficiency in the operation of the Port.

**STATE CIVIL SERVICE PROVISIONS ARE MORE ADVANTAGE-
OUS TO STATE BELT RAILROAD EMPLOYEES THAN THOSE
IN THE CONTRACT**

Under the Civil Service Act, employees of the Railroad have many advantages which their counterparts on other railroads do not enjoy.

From the employees' standpoint, pay is the most important part of the employment relationship. Under the Civil Service System now in effect, State employees in the classes involved here are paid at the same rate as employees on privately operated railroads but with more certain and steady employment. After two years of service, State employees are paid at a rate of ten

cents an hour higher than their counterparts in private employment (Calif. Govt. Code 18853, 18854; Calif. Admin. Code, Title 2, Sec. 111).

Adjustments in state rates for Civil Service employees are made regularly—as soon as they are made known to the State Personnel Board. They are made retroactive to the date of the change in private industry for hourly and per diem employees.

The rate provisions covering showup time, lay-off time, hazard and shift differentials for State Civil Service employees are the same as those specified in the contract. Therefore the contract gives Civil Service employees no advantage in these respects.

Appointment and promotion in the State Civil Service is based solely on merit, efficiency and fitness as ascertained by competitive examination — (Calif. Const. Art. XXIV) not solely on the basis of seniority as provided in the contract. The Civil Service provision is an incentive to the employee and promotes the public interest by promotion of those best qualified.

California Civil Service employees are entitled to 12 days of sick leave each year. There is no limit on the amount which can be accumulated (Calif. Govt. Code 18100, et seq.) The contract limits accumulation to 100 days.

Under Civil Service, layoffs are made in accordance with efficiency and seniority. (Calif. Govt. Code 19530, et seq.) The contract provides for seniority alone.

The Civil Service Act regulates dismissal, demotion and suspension. (Calif. Govt. Code 19570 et seq.) It provides for notice and hearing. There is an appeal

to the Personnel Board. There is review in the state courts. The contract provides for a complex procedure which might ultimately require appearances in the eastern part of the United States and a long distance from the employee's place of employment.

These and other provisions of the contract work to the extreme disadvantage of the employees of the Railroad. In almost every phase of employment conditions, the Civil Service Act is superior from the standpoint of the employee. Imposition of a system of collective bargaining under the Railway Labor Act nets the employees nothing of substantial value.

THE CONTRACT DISCRIMINATES AGAINST BELT RAILROAD EMPLOYEES

The rates of pay are set forth in Article 1 of said contract and are the only rates legally in effect at the present time. However, the rates were fixed when the contract was approved September 1, 1942. It is common knowledge that the rates of pay for these positions and all other work has substantially increased since 1942 due to the war, yet the contract rates of pay still stand as provided in Article 1 of said contract. They have not been changed in any way under the provisions of Article 28 of the contract. Had the civil service rules and regulations of the State of California been applicable to their employment the employees would be legally receiving a higher pay in accordance with the rates of pay established by the State Personnel Board and approved by the Department of Finance instead of rates of pay established by the Agreement.

Any payments of wages in excess of those provided in Article 1 of the contract that may have been made were and are illegal and the officials of the Harbor Board or employees of the Harbor Board responsible for paying rates of pay in excess of those provided in the contract are legally obligated to reimburse the State of California for such excess payments and the State of California is legally obligated to collect back from employees any excess payments so made.

According to the contract promotions shall be on the basis of seniority only regardless of ability or performance (Article 13). In the State Civil Service promotions are based on merit and ability. Under the State Civil Service an employee with ability and who has rendered meritorious service is given an opportunity to advance over someone who does not have equal ability and merit but who has worked for the State for a longer period of time. (State Constitution, Article XXIV, Section 1.) This lack of opportunity in the contract to advance by merit and ability is discriminatory and likewise deprives the State of the opportunity to promote the best-qualified people in the public interest.

In Section 2, of Article 14 of the contract a helper must decline promotion in accordance with Section 3b of Rule 7 of the Rules and Regulations of the State Personnel Board. There is no such subsection and rule in the rules of the Personnel Board at the present time.

Section 3a of Article 14 of the contract provides that firemen "shall be promoted to positions as engineers in accordance with Section 112 of the Civil

Service Act." There is at present no section of the Civil Service Act numbered 112. However, the contract requires the promotion to be made in accordance with the section as it existed in the law at the time the contract was entered into. It is difficult to correlate and reconcile the procedure of that section with other provisions of the contract. Nowhere does the contract provide for civil service examinations either for original appointment to the job or for promotions in them, yet Section 112 deals with appointments as the result of examinations. The uncertainty caused by this provision of the contract makes it administratively difficult to make promotions because of it and therefore makes employees' rights and benefits under the section ambiguous and uncertain and jeopardizes their opportunity for promotion.

Article 17 of the contract makes provision for presentation of grievances and in said section attempts to make provision for an appeal to the State Personnel Board but does not make any provision for the handling of such appeals by the State Personnel Board nor is there any legal provision giving the State Personnel Board jurisdiction to handle such appeals even if the contract supersedes State laws and civil service regulations. The provision is therefore meaningless and leaves the employees without adequate appeal protection. This is a further illustration of why the contract should first have been approved by the State Personnel Board.

Article 20 of the contract provides for a leave of absence. Its provisions are much more restrictive than

leaves of absences under the Personnel Board rules. (Government Code Sections 19330-19332, Personnel Board Rules 361-369.)

Article 23 of the Agreement provides the procedure when an employee is disciplined. If the employee appeals from discipline he may ultimately have to take it up with the National Railway Board located somewhere in the eastern United States and a long distance from his place of employment. This puts him at a disadvantage in handling it, whereas under the State Civil Service Act he could have the matter handled expeditiously very close at hand and with well-established rules and procedures for doing so. (Calif. Government Code, Sections 19570-19635.)

Article 25 of the contract provides the employee rights under the contract for sick leave with pay. Under Section 2 of the contract the employee can accumulate a total not to exceed 100 working days of sick leave. Under the Civil Service Act an employee can accumulate sick leave without limit. (Calif. Gov. Code, Section 18101.) As a result of this provision in the contract the Belt Railroad employees are deprived of a substantial right to accumulate sick leave which other State Employees have.

**RAILWAY LABOR ACT PROVISIONS CANNOT SUPERSEDE
STATE LAWS REGULATING STATE EMPLOYEES' SALARIES
AND WORKING CONDITIONS**

Under all the circumstances, it is obvious that application of the collective bargaining requirements of the Railway Labor Act to state employment would

constitute an unprecedented interference with a state's traditional method of fixing the working conditions of its employees, and it seems doubtful that Congress had such an intent. As stated in *Parker v. Brown*, 317 U.S. 341, 351, 63 S. Ct. 307, 313, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." (*State of California vs. Brotherhood of Railroad Trainmen*, 37 Cal. (2d) 412, 232 Pac. (2d) 857.)

TO BE VALID AND BINDING THE PROVISIONS OF THE CONTRACT MUST BE SUCH THAT MEETS WITH THE APPROVAL OF THE DEPARTMENT OF FINANCE AND THE STATE PERSONNEL BOARD

Section 18004 of the Calif. Govt. Code provides as follows: "Unless the Legislature specifically provides that approval of the Department of Finance is not required, whenever any state agency or court fixes the salary or compensation of an employee or officer, which salary is payable in whole or in part out of state funds, the salary is subject to the approval of the Department of Finance before it becomes effective and payable."

Inasmuch as the salary of the employees of the Harbor Board are payable out of State funds the salaries paid to the employees of the Harbor Board are by law subject to the approval of the Department of Finance before they can become effective and payable. Since the contract in Article 1 thereof establishes rates of

pay the agency established by law, namely the Department of Finance, must first approve the rates of pay on behalf of the State of California before they can become effective. It being clear that the Department of Finance did not approve the rates of pay the Harbor Commission exceeded its authority and jurisdiction in approving them thus making the contract void and of no effect from the beginning.

In other matters affecting the employment rights and benefits of State employees such as sick leave, vacation, seniority, layoff, dismissals, etc. the Legislature in adopting the Civil Service Act has provided that the State Personnel Board shall be the agency to handle the approval of them.

If each Department of State government was entitled to act by itself and make private contracts with the employees under its jurisdiction dealing with salaries and other working conditions and benefits we would have chaos in State government because we would have a hodge podge of working rights, benefits, conditions, wages and salaries under the single employer, the State of California. Such procedure could not be considered sound, wise and business-like public administration. It is therefore with wisdom that the Legislature of the State of California has centralized the approving and handling of these matters for all State agencies in the Personnel Board for certain purposes and the Department of Finance for others. The judgment in this case that each Department can bargain independently with its employees in connection with salaries, working conditions, etc. would decen-